TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 81.

FRED C. KEENEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF SUSAN A. KEENEY, DECEASED; SETH A. KEENEY AND ANGIE KEENEY SCHWEGEL, PLAINTIFFS IN ERROR,

vs.

THE COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SURROGATE'S COURT OF THE COUNTY OF KINGS, STATE OF NEW YORK.

FILED JULY 3, 1911.

(21,741.)

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a Court of Appeals of the State of New York.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

Petition for a Writ of Error.

Now come Fred C. Keeney, individually, and as Administrator of the estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, the appellants in the above-named matter, being all the parties interested in the estate of the decedent above-named, by Wilmer, Canfield & Stone, their attorneys, and say that on the 16th day of February, 1909, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of the Comptroller of the State of New York, the respondent (defendant in error) in the above-named matter, and against Fred C. Keeney, individually, and as Administrator of the estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, appellants (plaintiffs in error) in the above-named matter, and afterwards and on the 3rd day of April, 1909, the records and proceedings in said cause having been remitted to the Surrogate's Court of the State of New York in and for the County of Kings, said final order and judgment of the Court of Appeals were made and entered as the final order and judgment of said Surrogate's Court, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said appellants hereinbefore named, all of which will more in detail appear from the assignment of errors which is filed with this petition.

b The said Court of Appeals of the State of New York is the highest Court of said State of New York in which a decision in this cause could be had.

Wherefore your petitioners pray that a writ of error may issue in their behalf from the Supreme Court of the United States to the Surrogate's Court of the State of New York in and for the County of Kings for the correction of the errors and the reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States. That said writ of error operate as a supersedeas. That the amount of security which petitioners shall give and furnish on said writ of error may be fixed, and that upon the giving of such security all further proceedings in said Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated: April 14, 1909.

WILMER, CANFIELD & STONE,
Attorneys for Petitioners.

#49 Wall Street, Manhattan, New York City.

A writ of error as prayed for in the foregoing petition is hereby allowed, and the bond for that purpose is fixed at the sum of $500.

Dated: June 5, 1909.

(Sd.) EDGAR M. CULLEN,
Chief Justice Court of Appeals, New York.

c [Endorsed:] Court of Appeals of the State of New York. In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, Deceased. Petition for a writ of error. Wilmer, Canfield & Stone, Attorneys for Petitioners, #49 Wall Street, Manhattan, New York City.

d The President of the United States of America to the Honorable Surrogate of the County of Kings, of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of an order which is in the said Surrogate's Court of the County of Kings in the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had in the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Susan A. Keeney, deceased, wherein was drawn in question the validity of a statute of and an authority under the said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the damage of the petitioners herein, Fred C. Keeney, individually and as administrator of the estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in the District of Columbia within thirty (30) days from the date hereof in
e the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 17″ day of June in the year of our Lord Nineteen hundred and nine.

Done in the City and County of New York with the seal of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States,
for the Southern District of New York.

Allowed by me, Chief Justice of the Court of Appeals of the State of New York.

EDGAR M. CULLEN,
Chief Judge.

f [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, Deceased. Writ of Error. Wilmer, Canfield & Stone, Esqs., Attorneys for Appellants, #49 Wall Street, New York City.

g STATE OF NEW YORK,
County of Kings, ss:

I, Edward J. Bergen, Clerk of the Surrogate's Court of the County of Kings, State of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages attached hereto and numbered 1*a*, 1*b*, 1*c*, 1*d*, 1 to 53 inclusive and 58 to 66 inclusive, contain a true and complete transcript from the record of all the proceedings in the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Susan A. Keeney, deceased, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, Borough of Brooklyn, County of Kings, in the State of New York, this 22nd day of June, in the year of our Lord one thousand nine hundred and nine.

[Kings County Surrogate Seal.]

EDWARD J. BERGEN, *Clerk.*

h Court of Appeals of the State of New York.

In the Matter of the APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

Papers on Appeal.

WILMER, CANFIELD & STONE,
Attorneys for Appellants,
49 *Wall Street, Borough of Manhattan, New York City.*

JOHN S. BENNETT,
Attorney for the Comptroller of the State of New York.

1 *Notice of Appeal to Appellate Division.*

Surrogate's Court, Kings County.

In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Susan A. Keeney, Deceased.

Sirs: Please take notice that Fred. C. Keeney, individually and as Administrator of the Estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, hereby appeal to the Appellate Division of the Supreme Court of the State of New York, for the Second Department, from the order of the Surrogate of the County of Kings, heretofore made and entered herein on the 13th day of April, 1908, affirming the order theretofore made and entered on the 24th day of September, 1907, fixing the tax upon the
2 Estate of said decedent under the Act relating to taxable transfers, and from each and every part thereof.

Dated, April 14th, 1908.

Yours, &c.,

WILMER, CANFIELD & STONE,
Attorneys for Appellants.

Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York City, N. Y.

To Clerk of the Surrogate's Court of the County of Kings;
John S. Bennett, Esq., Attorney for the Comptroller of the State of New York.

3 *Petition for Appointment of Appraiser, Read on Behalf of Appellant.*

Kings County, Surrogate's Court.

In the Matter of The Appraisal under the Transfer Tax Acts of the Property of Susan A. Keeney, Deceased.

To the Surrogate's Court of the County of Kings:

The petition of Fred. C. Keeney respectfully shows:

That your petitioner is the Administrator of the Estate of Susan A. Keeney, late of the County of Kings, State of New York, deceased, who departed this life on the 29th day of March, 1907. That letters of administration on the estate of said deceased were, on the 20th day of June, 1907, issued to your petitioner by the Surrogate's Court of the County of Kings. That the estate of said decedent is or may be subject to the tax imposed by the law in relation to taxable Transfers.

That all the persons who are interested in said estate and who are entitled to notice of all proceedings herein, their degree of relation-

ship to said decedent, and their Post Office addresses are as follows, viz:

Name.	Post office address.	Relationship.
Fred. C. Keeney, (Petitioner)	care of Wilmer & Canfield, No. 49 Wall Street,	Son
Seth A. Keeney	No. 49 Wall Street,	Son
Angie K. Schwegel	No. 49 Wall Street,	Daughter

That all the above named are of full age and sound mind.

Wherefore your petitioner prays for the appointment of an appraiser, as provided by law.

Dated, New York, June 26, 1907.

F. C. KEENEY,
Petitioner.

COUNTY OF NEW YORK, *ss:*

Fred C. Keeney, being duly sworn, deposes and says: That he is the petitioner herein; that he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true to his own knowledge, except as to the matter therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FRED. C. KEENEY.

Sworn to before me, this 24th day of June, 1907.

ARTHUR B. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

5 *Order Appointing Appraiser, Read on Behalf of Appellants.*

At a Surrogate's Court Held in and for the County of Kings at the Surrogate's Court Room in the Hall of Records, on the 26th Day of June, in the Year One Thousand Nine Hundred and Seven.

Present Hon. James C. Church, Surrogate.

In the Matter of THE APPRAISAL UNDER THE TRANSFER TAX ACTS OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

On reading and filing the petition of Fred. C. Keeney, Administrator of the Estate of said decedent, I do hereby, pursuant to the requirement of Chapter 658 of the laws of 1900, direct Thomas F. Wogan, Esq., one of the appraisers appointed by the State Comptroller under said statute, to fix the fair market value of the property which was of the above-named decedent, and which is subject to the payment of any tax imposed by Article X., Chapter 908, Laws of 1896, and the acts amendatory thereof and supplemental thereto.

JAMES C. CHURCH,
Surrogate.

6 *Notice of Appraisal.*

Surrogate's Court.

COUNTY OF KINGS,
State of New York:

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

You will please take notice that by virtue of an Order of Hon. James C. Church, Surrogate of the County of Kings, State of New York, dated June 26, 1907, and pursuant to the provisions of Chapter 908 of the Laws of 1896 entitled "An Act in relation to Taxable Transfers of Property" and of the several acts amendatory thereof and supplemental thereto, I shall on July 5, 1907, at 2 o'clock p. m., at my office, Arbuckle Building, 371 Fulton Street, in the Borough of Brooklyn, City of New York, County and State aforesaid, proceed, to appraise at its fair market value all the property of said decedent, late of said County, passing by decedent's last Will
7 and Testament, or by the Intestate Laws or otherwise, which is subject to the payment of the tax imposed by the said several acts.

Kings County, Borough of Brooklyn, N. Y., June 29, 1907.

THOMAS F. WOGAN, *Appraiser.*

To the Comptroller of the State of New York, Albany, N. Y.:

Fred. C. Keeney, c/o Wilmer & Canfield, 49 Wall Street, N. Y. City.
Seth A. Keeney " " " " "
Angie K. Schwegel, " " " " "

Notice of Appearance of Seth A. Keeney and Angie Keeney Schwegel.

Surrogate's Court, Kings County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

SIR: Please take notice that Seth A. Keeney and Angie
8 Schwegel appear in the above-entitled proceeding, and that we are retained as attorneys for them, and we hereby demand that all papers in this proceeding be served on us at our office, No. 49 Wall Street, Borough of Manhattan, New York City.

Dated, August 22nd, 1907.

Yours, etc.,

WILMER & CANFIELD.
Attorneys for Seth A. Keeney and Angie Schwegel, Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York, N. Y.

To Thomas F. Wogan, Esq., Transfer Tax Appraiser.
To Attorney for State Comptroller, 371 Fulton St.

9 *Affidavit of F. C. Keeney, Administrator. Read on Behalf of Appellants.*

Surrogate's Court, Kings County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Fred. C. Keeney, being duly sworn, deposes and says:

That he resides at Hotel Astor, Borough of Manhattan, New York City, N. Y.

That said decedent died on the 29th day of March, 1907, and at the time of her death was a resident of the County of Kings, residing at 175 Washington Park, Borough of Brooklyn, New York City.

That said decedent left no Last Will and Testament, but died intestate and Letters of Administration upon her said estate were duly issued to deponent by the Surrogate's Court of the County of Kings, on the 20th day of June, 1907, and deponent has duly qualified and is now acting as administrator of the estate of said decedent.

10 That hereto annexed and made a part hereof is an itemized statement, marked "A," of all the property, real and personal, wheresoever situate, of which said decedent died seized and possessed, except real estate without the State of New York, if any.

That at the time of her death said decedent had no safe deposit box, no bonds, public or private, no mortgages or promissory notes, no deposits in any trust company, bank or bank for savings, no money in hand, no interest in any business or co-partnership, no shares of stock, no life insurance or interest in any estate, no silverware, jewelry, household furniture, personal effects, statuary, works of art, paintings, pictures, bric-a-brac, horses or carriages, and was possessed of no other personal property of any kind or nature, except as set forth in said Schedule "A" or except as may possibly hereafter be determined to be contained in a certain deed of trust executed by decedent in her lifetime to the Fidelity Trust Company of New Jersey, but deponent is advised by counsel learned in the law, and verily believes that all the property conveyed by said deed of trust forms no part of said decedent's estate; a copy of said trust deed is annexed hereto and made a part hereof.

That said decedent at the time of her death owned no real estate within the State of New York, except as set forth in said Schedule "A."

That prior to her death said decedent made no transfer of property of any kind, by deed, grant, bargain, sale or gift, in contemplation of death or intended to take effect at or after death, except as may possibly hereafter be determined to be contained in said trust deed above referred to (copy of which is annexed hereto and made part hereof) executed by said decedent on the 30th day of June, 1903, to the Fidelity Trust Company of New Jersey; that said trust

11 deed was executed and delivered by decedent in her life time on said date and that on said date and long prior thereto

decedent was in the enjoyment of good health both in body and mind and was not sick or infirm or suffering from any bodily ailment of any kind or nature which would make her apprehensive of death, and said decedent on said date and prior thereto was actively engaged in the management of her household affairs and fulfilling all her social obligations; that deponent has consulted with counsel learned in the law and is advised and verily believes that said property nor any part thereof passing under said deed of trust is taxable by the State of New York in this proceeding; that at the time of decedent's death all of said property passing under said deed of trust was located without the State of New York, to wit, in the State of New Jersey, and was in the custody of said Fidelity Trust Company and has not been and cannot be in any way taken possession of by deponent as administrator of the estate of said decedent.

That there were no claims due and owing to said decedent at the time of her death.

That deponent has made diligent search for property of every kind, nature and description, left by said decedent, and that he has been able to discover only that mentioned herein, and that he verily believes that said decedent left no property, either real or personal, excepting that set forth herein.

That the fair market value of the entire personal estate of said decedent at the time of her death was the sum of $12,193.55.

That the fair market value of the real estate owned by decedent within the State of New York at the time of her death was the sum of $13,800, the assessed valuation of the same being $12,000.

12 That the funeral expenses of said decedent amounted to the sum of $800, which have been paid; that an itemized statement thereof marked "B" is annexed hereto and made a part hereof.

That the debts itemized in a statement hereto annexed, marked "C," and made a part hereof, due and owing by decedent at the time of her death, exclusive of funeral expenses, mortgages on real estate, inheritance taxes paid to the United States Government, or to any foreign or state government, or loans secured by collateral, amount to the sum of $1,411.36.

That the administration expenses incurred and to be incurred, exclusive of expenses set forth in the preceding paragraphs amount to the sum of $2,500.

That the commissions allowed to me as administrator amount to the sum of $449.95.

That all the persons in interest are of full age and sound mind and are as follows:

Seth A. Keeney, Angie K. Schwegel, Fred. C. Keeney (deponent) c/o Wilmer & Canfield, 49 Wall Street, New York City.

F. C. KEENEY.

Sworn to before me, this 17th day of July, 1907.

ARTHUR B. SMITH,
Notary Public, Kings County.

Certificate filed in New York County.

13 SCHEDULE "A."

Personal Property.

Cash in Long Island Loan & Trust Co. with interest to date of decedent's death		$812.58
Cash in Fidelity Trust Co. of New Jersey with interest to date of decedent's death		5,726.72
Household furniture in home at No. 175 Washington Park, Brooklyn, N. Y., as follows:		
Basement	$65.00	
First floor	775.50	
Second floor	335.25	
Third floor	107.00	
Fourth floor	35.00	
Lace curtains in various parts of the house	30.00	
Cut glass	77.00	
China	60.00	
Silverware	115.00	
Linen	20.00	
		1,641.75

Contents of Stable.

1 Brougham	$400.00	
1 Victoria (sold)	300.00	
1 Exercise Wagon	nominal	
Harness (sold)	27.50	
2 Horses (sold)	300.00	
1 Double Harness (sold)	50.00	
1 Lap Robe (sold)	10.00	
2 Street Blankets	10.00	
Stable Blankets and Sheets	5.00	
14 Stable Utensils	5.00	
Miscellaneous	5.00	
		1,312.50

Jewelry.

1 Twin ring, about 6 karats 2 diamonds	1,200.00	
1 Twin ring, 2 diamonds, about 4 karats	900.00	
1 Old mine diamond set in onyx ring about 1¼ karats	125.00	
1 Marquise ring, 36 diamonds and 1 ruby	175.00	
		2,400.00
Forward		5,354.25

Brought Forward		$5,354.25
(See affidavit of Appraisal H. Healy, jeweler, 435 Fulton Street, Brooklyn, N. Y., hereto annexed)		
Wearing Apparel, (including furs)		$300.00
Total Personal Property		$12,193.55

Real Estate.

175	Washington Park, Borough of Brooklyn, New York City; Section 7, Vol. 3, Block No. 2072, assessed Valuation according to 1906 Tax Bill was $12,000, said premises		
15	used as a private residence and not rented	$13,800	$13,800.00
	Total Real Estate		$13,800.00

SCHEDULE "B."

Funeral Expenses.

Undertaker's services as follows:		
Casket, handles, 2 plates, oaken case, cartage of same	$305.00	
Copper plate, engraved	3.00	
Preserving remains	10.00	
Hearse hire	10.00	
Hire 10 carriages at $500	50.00	
Hire 1 carriage, Rev. S. Roeh	4.00	
Hire 1 carriage, Rev. S. Roeh	5.00	
Hire 6 porters at $1.50	9.00	
Hire 5 doz. chairs at 75c	3.75	
Wagon—flowers to the cemetery	4.00	
Cash paid use of storm tent	2.00	
Cash bricking and flagging grave and interment	45.00	
Cash gratuities	2.50	
		453.25
Florist as follows:		
Pall of violets	250.00	
16 3 Sprays for door	30.00	
Loan of palms	15.00	
		295.00
A. F. Dalzell:		
Granite post and inscription		51.75
		$800.00

SCHEDULE "C."

Accounts Due and Owing by Decedent at Date of Her Death.

Russell M. Rome, M. D.	
Professional services	$9.00
Charles Jewett, M. D.	
Professional services	143.00
B. Carmen	
Newspapers containing death notices	1.88
Klopsch, drugs to March 28, 1907	59.89
Duncan A. Dobie, M. D.	
Professional services	150.00
Drs. McLean & McAuslin Vet. Sur's.	
Professional services, Sept. 12, 1906 to Feb. 23, 1907	90.50
Loeser & Co.	
Dry Goods for March, 1907	13.20
Erdmann Seifert	
Furniture repairing, etc., July 3, 1906, to Jan. 15, 1907	78.75
Frost Bros. Coal Co.	
Coal and wood, Dec. 22, 1906, to Mar. 11, 1907	26.00
Wm. Wise & Sons	
17 Jewelry, Nov. 2, 1906 to Dec. 24, 1906	207.00
Geo. W. Perry, Blacksmith	
Jan. 11, 1907 to March 27, 1907	42.00
W. A. Ketcham	
Meats, to March 26, 1907	131.59
S. Chichester	
Drugs, Jan. 2, 1907, to March 2, 1907	6.40
Abraham & Straus	
Sundries to March 26, 1907	99.51
Jordan & Co.	
Harness supplies, Jan. 5, 1907, to March 11, 1907	33.35
B. F. Sullivan	
Carriage repairing, Jan. 1, Mar. 1, 1907	12.00
Paul Suss	
Oats, hay, etc., March 1, 1907	31.66
Acker, Merrill & Condit Co.	
Groceries, Nov. 1906 to Feb. 1, 1907	44.90
Haviland Bros.	
Oysters and fish, month of March	2.56
Home of Good Shepherd	
Laundry, Mar. 4, 1907 to Mar. 25, 1907	8.59
Isaac Rushmore	
Milk and cream, March, 1907	10.40
Brooklyn Union Gas Co.	
Gas in March, 1907	3.76
American District Telegraph Co.	
Night police patrol, March, 1907	1.25

Ohlandt	
Groceries to March 29, 1907	174.77
American District Telegraph Co.	
Services to March 1, 1907	5.00
New York & New Jersey Telephone Co.	
Services to March 29, 1907	20.64
Brooklyn Union Gas Co.	
March, 1907, gas bill	3.76
	$1,411.36

18 *Affidavit of H. Healy as to Value of Jewelry.*

Surrogate's Court, Kings County.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

STATE OF NEW YORK,
County of Kings, ss:

H. Healy, being duly sworn, deposes and says: That he is engaged in and carries on a jewelry business at 435 Fulton Street, Borough of Brooklyn, New York City; that he has been engaged in the said business for the past twenty-three years, and is competent to judge and appraise the value of all kinds of jewelry and precious stones; that he was requested to appraise the jewelry belonging to the late Susan A. Keeney, of 175 Washington Park, Brooklyn, N. Y. That the following is a fair and just value of the jewelry and stones submitted to him for such appraisal, to wit:

1 twin ring, about 6 karats, 2 diamonds	$1,200.00
1 twin ring, 2 diamonds, about 4 karats	900.00
19 1 old mine diamond, set in onyx ring, about 1¼ karats	125.00
1 Marquise ring, 36 diamonds and one ruby	175.00

HENRY HEALY.

Sworn to before me, this 11th day of July, 1907.
JAMES P. McMANUS,
Notary Public, Kings County.

Certificate filed in New York County.

Trust Deed, Annexed to Affidavit of F. C. Keeney, Read on Behalf of Appellants.

This indenture made this thirtieth day of June in the year of Our Lord One Thousand Nine Hundred and Three, between, Susan A. Keeney, widow, of the Borough of Brooklyn, City and State of New York, party of the first part, and Fidelity Trust Company, Trustee,

a corporation of the State of New Jersey, having its principal office in the City of Newark, in the County of Essex, and State of New Jersey, party of the second part,

Witnesseth: That the said party of the first part, in consideration of the sum of One Dollar, and other good and valuable consideration, and of the agreements and covenants hereinafter contained, has given, granted, bargained, sold, conveyed, assigned, and set over unto the said party of the second part, and by these presents does give, grant, bargain, sell, convey, assign and set over unto the said party of the second part, its successors and assigns forever all the following described property, both real and personal estate:

20 All that certain ranch property, situate near Big Springs, in the County of Howard, and State of Texas, and also all the personal property, stocks, bonds, securities and evidences of debt, described and set forth more specifically in the schedule hereto annexed.

To have and to hold all and singular the above granted and described land, premises and personal property with the appurtenances thereto belonging, to the said party of the second part, its successors and assigns forever, in trust, however, that the said trustee, and its successors, shall hold the same during the lifetime of the said party of the first part upon the following trusts, and shall dispose of the same, after the death of the said party of the first part according to the further provision hereof, said trusts during the lifetime of the said party of the first part to be as follows:

To hold the said property, both real and personal, and to collect the income of the same, and after paying all necessary and proper expenses connected with the management of the said property, including the compensation of the said trustee, as hereinafter provided, to divide the net income thereof equally between, and pay the same quarterly on the fifteenth days of each January, April, July and October, to the party of the first part, Seth A. Keeney, Angie Keeney Smith and Fred. Chase Keeney, the children of the party of the first part, but in making such division of the income, consideration should be taken of the fact that the party of the first part has heretofore advanced to the said Seth A. Keeney, the sum of Two Hundred Thousand Dollars, and for the purpose of making a fair and equal distribution of the income of the estate, under this instrument, the sum of Eight Thousand Dollars, being the income

21 of said Two Hundred Thousand Dollars, calculated at four per cent., shall be charged annually against the share of the income to be paid to the said Seth A. Keeney, in such manner that he shall receive no more and no less than each of the other three persons sharing in said income. Should the said Seth A. Keeney die prior to the death of the said party of the first part, then the said party of the second part shall pay over to the widow of the said Seth A. Keeney, all that portion of the income of said estate which would have been the portion of the said Seth A. Keeney, until the youngest of the children of the said Seth A. Keeney attains the age of thirty years, when the widow shall receive one-half of said income, and

one-half thereof shall be divided among said children of said Seth A. Keeney.

In case of the death of the said Angie Keeney Smith prior to the death of the party of the first part, one-third of the income hereby directed to be paid to the said Angie Keeney Smith, is to be paid to her husband, during his life, and the other two-thirds share of such income to the legal guardian of such children then living as may have been born to the said Angie Keeney Smith until the youngest of said children attains the age of thirty years when the income of the entire distributive share, which would have been of Angie Keeney Smith, in the estate of the said party of the first part, shall be paid to said children direct. If, however, the said husband of Angie Keeney Smith shall be still living when such youngest child attains the age of thirty years, one-third of the income of said distributive share shall continue to be paid to said husband of Angie Keeney Smith until his death, when the entire income of such share of Angie Keeney Smith shall be paid to such children.

22 In case of the death of Fred. Chase Keeney prior to the death of the party of the first part, one-third of the income hereinbefore directed to be paid to him shall go to his widow for her life, and the remaining two-thirds divided between the party of the first part, Seth A. Keeney or his legal representatives, and Angie Keeney Smith or her children, share and share alike.

In case of the death of either the said Seth A. Keeney, Angie Keeney Smith, or Fred. Chase Keeney, before the death of the party of the first part, leaving him or her surviving no husband, widow, or children, the share of the income payable under this instrument to such deceased person shall be paid to the party of the first part and the survivors or survivor of the said Seth A. Keeney, Angie Keeney Smith and Fred. Chase Keeney, share and share alike. And said trustee is further directed and authorized, at the request in writing of the said party of the first part, to advance to Fred Chase Keeney, or Angie Keeney Smith, from the principal of said estate, on account of their distributive shares therein, any sum up to the sum of two hundred thousand dollars each; such advances however, to be charged against their distributive shares respectively upon final distribution, and the interest thereon to be calculated at four per cent. per annum, to be deducted from their shares of income payable under the provisions of this deed, as in the case of the said Seth A. Keeney above set forth.

And upon the further trust upon the death of the said party of the first part, to distribute the principal of the said estate so held in trust, both real and personal, in the following manner; To divide all the property so held in trust by said Trustee, excepting

23 the stock of the said party of the first part in the Brooklyn Daily Eagle Association, and in the Prudential Insurance Company, between the said Seth A. Keeney, or his legal representatives, Angie Keeney Smith, or her children, and Fred Chase Keeney, if he be living, share and share alike; if Fred Chase Keeney be de-

ceased, his share to be divided between Seth A. Keeney or his legal representatives, and Angie Keeney Smith, or her children; and as to said stock in the Brooklyn Daily Eagle Association and Prudential Insurance Company, to hold the same in trust, and to pay over the net income thereof, one-third to said Seth A. Keeney during his life; at his death, or should he be deceased at the death of the party of the first part, such one-third share of income derived from said stocks shall be paid to his widow, should he leave a widow him surviving; at her death, or should he leave no widow, such one-third share of income shall be paid to the children of said Seth A. Keeney, until the final distribution of the principal of said stock as hereinafter provided.

One-third of the income derived from said stocks shall be paid to the said Fred Chase Keeney during his life; at his death, or should he be deceased at the death of the party of the first part, such share shall be divided equally between Seth A. Keeney or his legal representatives, and Angie Keeney Smith and her children.

One-third of the income derived from said stocks shall be paid to said Angie Keeney Smith during her life; at her death, or should she be deceased at the death of the party of the first part, one-third of her one-third share of such income shall be paid to her husband, should she leave a husband her surviving; and the remaining two-thirds of her share of said income, to her children. Should she leave no husband, or at the death of such husband, before
24 the termination of this trust, the whole of the said Angie Keeney Smith's share in such income shall be paid to her children until the final distribution of the principal of such stocks, as hereinafter provided.

Should either said Seth A. Keeney, Fred Chase Keeney, or Angie Keeney Smith die before the termination of this trust, leaving no widow, husband or children him or her surviving, the share of income of such diseased person or persons, derived from said stocks of the Brooklyn Daily Eagle Association and Prudential Insurance Company, shall be paid to the survivors or survivor of them, share and share alike.

At the death of the last survivor of the said Seth A. Keeney, Fred Chase Keeney and Angie Keeney Smith, this trust shall terminate, and the said shares of stocks so held in trust of the Brooklyn Daily Eagle Association and Prudential Insurance Company shall be divided among the children of the said Seth A. Keeney, Fred Chase Keeney and Angie Keeney Smith per stirpes, and not per capita, the issue of any deceased child to take the share which its parent would have been entitled to if living.

And it is further provided that said trust in relation to the said stock of the Brooklyn Daily Eagle Association and Prudential Insurance Company above provided, may be terminated at any time by the unanimous request in writing of the said Seth A. Keeney, Angie Keeney Smith, and Fred Chase Keeney, or the survivors of them, but not otherwise, requesting said trustee to divide the said stock in three equal portions among the said Seth A. Keeney, Angie Keeney Smith, and Fred Chase Keeney, or the survivors of them,

and the legal representatives of such of them as may, at the time of making the said request, be deceased.

25 And it is hereby agreed and declared that it shall be lawful for the said trustee, or its successors, in the trusts hereby created for the time being, either to permit the said property to remain invested as it now is, or at its discretion to reinvest the same in proper securities, and from time to time to vary the said investments in its discretion, but said stock in the Brooklyn Daily Eagle Association and the Prudential Insurance Company shall not be sold, nor shall any portion thereof be sold by said Trustee, except with the consent in writing of John F. Dryden and Seth A. Keeney, or the survivor of them; to compromise or compound any action or actions relating to said trust premises upon any terms which it shall think proper, and to execute all instruments, and do all things expedient for such purpose, and to sell, convey and give proper deeds of conveyance for any portion of the real estate hereinabove conveyed, or in its discretion to lease said real estate, or any part thereof, and in general to manage and conduct the business of the said property as fully and absolutely as the said Trustee could do if it was the absolute owner of the said trust premises, and without being answerable for any loss that may be occasioned thereby, except by gross neglect or wilful mismanagement of the said Trustee; it being hereby agreed that the compensation of the said Trustee shall be for the first year during which it shall hold said property, and execute the trusts hereinabove imposed, the sum of fifteen hundred dollars, and for each year thereafter, until the death of the said party of the first part the sum of one thousand dollars.

It is also agreed that in case of any considerable reduction being made in the corpus of the estate held in trust by said trustee
26 hereunder, by reason of advances or otherwise, a pro rata reduction shall be made in the compensation of the Trustee.

The party of the first part hereby reserves the power to revoke, alter or modify the whole or any part of this conveyance in trust, at any time, upon six months' notice in writing, and in case of the revocation hereof, the party of the second part shall thereupon, after properly accounting for the moneys and other property in its hands, execute such instrument of reconveyance to the party of the first part as may be necessary.

In witness whereof the party of the first part has hereunto set her hand and seal, and the party of the second part has caused these presents to be signed by its president and its corporate seal to be hereto affixed, the day and year first above written.

STATE OF NEW YORK,
County of Kings, ss:

Before me, —— ——, a Notary Public of the State of New York, on this day personally appeared Susan A. Keeney, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this — day of June, A. D. Nineteen Hundred and three.

——— ———.

27 *Schedule.*

14 Shares stock of Brooklyn Daily Eagle Association, par value $100 per share.

538 44/100 Shares of stock, Prudential Insurance Company of America, par value $50 per share.

50 shares of stock, Franklin Trust Company, par value $100 per share.

200 Shares of stock, American District Telegraph Company, par value $25 per share.

70 Bonds Pere Marquette Rail Road Co., Consolidated Mortgage 4 per cent., 50 year Gold Bond, due January 1, 1951, $1,000 each.

70 Bonds, Birmingham Belt Rail Rd. Co., First Mortgage 4 per cent., Gold Coupon Bond, due 1922, $1,000 each.

146 Bonds, South Jersey G. E. & T. Co., 5 per cent. First Mortgage Gold Bond, due March 1, 1953, $1,000 each.

70 Bonds, Pittsburg, Cin. Chic. & St. L. Ry. Co., 4 per cent. Series D 8,000,000, Gold Consolidated Mortgage Loan of 75,000,000 due Nov. 1, 1945, $1,000 each.

35 Bonds Milwaukee Gas Light Co., First Mortgage, 4 per cent. Gold Bond, due May 1, 1927, $1,000 each.

39 Bonds, Cleveland, Cin. Chic. & St. L. Genl. Mtg., 4 per cent. Gold Bond, due June 1, 1993, $1,000 each.

10 Bonds, St. L. & San Francisco R. Rd. Co. Equipment Notes, due May, 1912, 4 per cent. Series C., $1,000 each.

20 Bonds, do. due Nov. 1912, 4 per cent. Series C., $1,000 each.

55 Bonds, N. Y. Lack. & Western Ry. Co., Terminal & Improvement Bonds, 4 per cent., due 1923, $1,000 each.

35 Bonds, Kansas City, Fort Scott & Memphis Rway. Co., 4 per cent. Refunding Mtg. Gold Bond, due 1936, $1,000 each.

28 *Additional Affidavit of Arthur B. Smith, Read on Behalf of Appellants.*

Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF SUSAN A. KEENEY, Deceased.

STATE OF NEW YORK,
County of New York, ss:

Arthur B. Smith, being duly sworn, deposes and says, that he is an attorney and counsellor-at-law of the office of Wilmer & Confield, attorneys for the petitioner in the above entitled matter. That he has examined the report made by Hon. Charles K. Lexow, one of the Transfer Tax Appraisers for the County of New York, in the pro-

ceeding entitled "In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of William Ziegler, Deceased." That among the assets of said Ziegler Estate are listed ten (10) shares of Brooklyn Daily Eagle; that the affidavit of E. Matilda Ziegler, William J. Gaynor and William S. Champ, Executors of the Estate of William Ziegler deceased, annexed thereto, values said ten (10) shares of Brooklyn Daily Eagle at Six Thousand Dol-
29 lars ($6,000.00) per share, or a total of Sixty Thousand Dollars ($60,000.00). That the report of said Hon. Charles K. Lexow, filed in the office of the Surrogate of the County of New York on November 2nd, 1906, appraises said ten (10) shares of Brooklyn Daily Eagle as follows:

"10 Shares Brooklyn Daily Eagle, par value $1,000 each, at $6,000 ..... $60,000."

And the order confirming said appraiser's report was entered in the office of the said Surrogate's Court on November 16, 1906. Upon information and belief, that said William Ziegler died on or about May 25, 1906.

That annexed hereto and made a part thereof is a letter received from William Hester, President of the Brooklyn Daily Eagle Association, bearing on the value of this stock; that the officers of said Daily Eagle Association have declined to make any affidavit in this proceeding.

ARTHUR B. SMITH.

Sworn to before me, this 13th day of September, 1907.

IDA M. LANGE,
Notary Public, Westchester County.

Certificate filed in New York County.

(Vignette.)

Wm. Hester, President.
Wm. V. Hester, Secy. & Treas.
H. F. Gunnison, Business Manager.

PUBLICATION OFFICE,
THE BROOKLYN DAILY EAGLE,
BROOKLYN, NEW YORK, *Sept.* 6, 1907.

Messrs. Wilmer & Canfield, 49 Wall Street, New York.

GENTLEMEN: Your communication in relation to the
30 Estate of Susan A. Keeney, deceased, is before me and I will give you all the facts in my possession. There has been no sale of the stock of the Eagle except as between the holders of it, which was not made public, and in each case the party buying the stock, being interested in the business, paid more for it than an outsider would merely for investment purposes. I know that a few years ago, the stock was assessed in transfer by death at $8,000.00 a

share. That I know to be a fact. In a case more recent, the Ziegler estate, I understand that it was no more than $10,000.

It is very desirable in the interest of the holders of the stock, that its assessed value be kept within reasonable limits. The Eagle is a close corporation, the stock being held by very few, and an exaggerated value has been placed upon its earnings and its value in the market by the public, which is no doubt shared by the appraiser of Kings County.

It is unfair to base the value of a newspaper property by what it paid last year or this year, as it is among the most perishable of industries and there are so many things liable to occur to interfere with its earning power. For instance, during the past year the demands of the labor unions have been a great burden to all newspaper properties in New York. Amalgamated copper, which is paying 8 per cent. dividend to-day and can be bought between 70 and 75 on the market, is a far more substantial investment than any newspaper property in the country.

The amount fixed in this case will establish a rating for future transactions, and it is desirable that every argument should be used with the appraiser not to put too high a value upon it.

Very truly yours, W. HESTER.

31 STATE OF NEW YORK:

Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE ESTATE OF SUSAN A. KEENEY, Deceased.

Decedent died March 29, 1907, she then being a legal resident of the said County of Kings.

To the Hon. James C. Church, Surrogate of the said County of Kings:

I, the undersigned, one of the appraisers for the said County of Kings, of property subject to payment of Transfer Tax, under the laws of this State, having been directed by an order made on the 26th day of June, 1907, by said Surrogate, a copy of which order is hereto annexed, to appraise at its fair market value the property of said decedent, in pursuance of the laws in relation to taxable transfers of property, do respectfully report:

First. That on the 29th day of June, 1907, I duly gave notice by mail, postage prepaid, to all persons and corporations known to me to have or claim an interest in any of the property of said decedent, subject to payment of any tax imposed by said laws,
32 including the Comptroller of the State of New York, of the time and place at which I would appraise such property, a true copy of which notice together with proof of mailing thereof is hereto annexed.

That the names of those to whom I mailed said notices, properly addressed, as appears by said proof of mailing, are as follows:

Comptroller of the State of New York.

Fred C. Keeney,

Seth A. Keeney,

Angie K. Schwegel.

Second. That following appearances were made before me in this proceeding: John S. Bennett, Esq., for the State Comptroller; Messrs. Wilmer & Canfield, 49 Wall Street, New York City, for Administrator.

Third. That said decedent died intestate on March 29 1907, she then being a legal resident of the County of Kings.

Fourth. I further report that at the time and place in said notice stated, to wit: at 2 o'clock p. m., July 5, 1907, at my office, Arbuckle Building, No. 371 Fulton Street, in the Borough of Brooklyn, City of New York, said County of Kings, and at other and subsequent times and divers places, to which these proceedings were regularly adjourned, I appraised all the property, of said decedent, subject to the payment of said tax, at its fair market value, as follows, to wit:

Personal Property.

	Balance in Long Island Loan and Trust Company.	$812.58
33	Balance in Fidelity Trust Company of New Jersey.	5,726.72
	Household furniture.....	1,641.75
	Contents of stable, consisting of 2 horses, 3 wagons, harness and stable utensils and belongings.....	1,312.50
	Jewelry	2,400.00
	Wearing apparel, including furs.....	300.00
		$12,193.55

Real Property.

	Premises 175 Washington Park, Brooklyn, N. Y.....	$13,800.00
		$25,993.55

Fifth. I further report that prior to her death, to wit, on June 30, 1903, the decedent made, executed and delivered her certain trust deed, dated on that day, wherein and whereby she conveyed to the Fidelity Trust Company (a corporation of the State of New Jersey) the following described property (exclusive of the real estate situate in the State of Texas):

538 44/100	shs.	Prudential Ins. Co., par 50, at 390%...	$104,995.80
14	"	Brooklyn Daily Eagle Association, par 1000, at 1000%.....	140,000.00
50	"	Franklin Trust Co., par 100, at 310.....	15,500.00
200	"	American District Tel. Co., par 100, at 25.....	5,000.00

34

70	$1000	bonds	Pere Marquette R. R. Co. Cons. Mtg. 4%, 50 year Gold, 1951, at 80.....	56,000.00
70	"	"	Birmingham Belt R. R. Co., First Mtge. Gold Coupon, 4%, 1922. at 93.....	65,100.00
146	"	"	South Jersey G. E. & T. Co., First Mtge. Gold, 5%, 1953, at 95.....	138,700.00
70	"	"	Pittsburg, Cin., Chic. & St. L. Ry. Co., 4%, Series D, Gold, Cons. Mtge. Loan, 1945, at 100¾%.....	70,525.00
35	"	"	Milwaukee Gas Light Co., First Mtge., 4%, Gold, 1927, at 90	31,500.00
39	"	"	Cleveland, Cin., Chic. & St. L. Gen. Mtge., 4%, Gold, 1993, at 97	37,830.00
10	"	"	St. L. & San Francisco R. R. Co., Equipment Notes, 4%, due May, 1912, Series C, at 90½.....	9,050.00
20	"	"	St. L. & San Francisco R. R. Co., Equipment Notes, 4%, due Nov., 1912, Series C, at 90¼.....	18,050.00
55	"	"	N. Y., Lac. & Western Ry. Co., Terminal & Imp., 4%, 1923, at 97	53,350.00

35

35	"	"	Kan. City, Fort Scott & Memphis Ry. Co., Rfdg. Mtge., 4%, Gold, 1936, at 80.....	28,000.00
			Of the aggregate value of.....	$773,600.80

upon the following trusts: To hold the property, to collect the income, and after paying expenses of trust to divide the net income equally between herself, and Seth A. Keeney, Angie Keeney Smith and Fred Chase Keeney, her children (with other provisions contingent upon death of either or all of said children); and upon the further trust, upon the death of decedent to distribute and divide said property equally between the above named children (with other provisions contingent upon the death of either or all), excepting the stock in the Brooklyn Daily Eagle Association and in the Prudential Insurance Company, provided to be held by said trustee upon a still further trust, but which trust, for the purposes of this proceeding, is assumed to be terminated at such time, and the stocks embraced therein to be included with the other property to be distributed and divided as aforesaid, the same as if the provision in said trust deed for the termination of the trust in relation to said stocks, "by the unanimous consent in writing" for such division, made to said trustee by said children, had then been fully performed and carried out.

36 That said decedent in and by said trust deed reserves to herself the power "to revoke, alter or modify the whole or any

part of this conveyance in trust," in the manner and upon the terms and conditions therein expressed.

That the said decedent by said trust deed, as to one-fourth portion of said property, of the value of.... $193,400.20

transferred the same, intending the transfer to take effect at her death, to—

Seth A. Keeney, Son	$64,466.74	
Angie Keeney Smith, Daughter	64,466.73	
Fred Chase Keeney, Son	64,466.73	
		$193,400.20

Sixth. And I further report:

The gross estate equals		$25,993.55
The deductions allowed are—		
Debts	$1,411.36	
Funeral expenses	800.00	
Administrator's commissions	311.94	
Administration expenses	2,500.00	
		5,023.30
The net estate equals		$20,970.25
Which passes under the intestate laws to—		
Seth A. Keeney, Son	$6,990.09	
Angie Keeney Schwegel, Daughter	6,990.08	
Fred Chase Keeney, Son	6,990.08	
		$20,970.25
Transfers made by decedent by the trust deed aforesaid, and intended to take effect at her death, to—		
Seth A. Keeney, Son	$64,466.74	
Angie Keeney Schwegel (formerly Smith), Daughter	64,466.73	
Fred Chase Keeney, Son	64,466.73	
		$193,400.20

The proof taken before me on the hearing is hereto annexed.
Borough of Brooklyn, Kings County, N. Y., September 14, 1907.
Respectfully submitted,

THOMAS F. WOGAN, *Appraiser.*

At a Surrogate's Court Held in and for the County of Kings, at the County Court House in said County, on the 24th Day of September, 1907.

Present: Hon. James C. Church, Referee.

In the Matter of THE APPRAISAL UNDER THE ACTS IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE ESTATE OF SUSAN A. KEENEY, Deceased.

Upon reading and filing the report of the Appraiser, Thomas F. Wogan, Esq., duly filed herein, on the 18th day of Septem-
38 ber, 1907, wherein it appears that said decedent died on the 29th day of March, 1907, and

Upon motion of Messrs. Wilmer & Canfield, attorneys for the petitioner herein, it is

Ordered and adjudged that the cash value of the property referred to in said report, the transfer of which is subject to the tax imposed by the act in relation to taxable transfers of property, and the tax to which said transfers are liable is as follows:

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Seth A. Keeney	$6,990.09	$69.90
Angie Keeney Schwegel	6,990.09	69.90
Fred Chase Keeney	6,990.09	69.96
		$209 70

Transfers made by decedent by a certain trust deed in said report referred to, as intended to take effect at her death, as follows:

Beneficiary.	Cash value of interest.	Tax assessed thereon.
Seth A. Keeney	$64,466.74	$644.67
Angie Keeney Schw-gel	64,466.73	644.67
Fred Chase Keeney	64,466.73	644.66
		$1,934.00

JAMES C. CHURCH, *Surrogate.*

39 *Notice of Appeal to Surrogate.*

Surrogate's Court, Kings County.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

SIRS: Please take notice that Fred C. Keeney, individually and as administrator of the estate of Susan A. Keeney, deceased, Seth A.

Keeney and Angie Keeney Schwegel, are dissatisfied with the appraisal herein of the property of the said Susan A. Keeney, deceased, and hereby object to the report of the appraiser filed herein on the 18th day of September, 1907, and to the order or decree made herein affixing, assessing and determining the transfer tax in respect of the property of the said decedent, and entered herein on the 24th day of September, 1907, and hereby appeal to the Surrogate from the said appraisal, and said assessment and determination of said tax, and from the said order or decree.

The grounds upon which said appeal was taken are:

I. That the tax imposed upon the transfer by decedent
40 during her lifetime of certain property to the Fidelity Trust Company, a New Jersey corporation, to be held by it in trust, was unlawful and illegal because

(*a*) The Taxable Transfers Act of the State of New York, under which said tax was imposed, in so far as it imposes taxes upon property transferred during lifetime, is unconstitutional and void, because it provides different rates of taxation and different exceptions and limitations to different classes, the classification adopted being of such an arbitrary and discriminating character as to make the tax imposed amount to taking property without due process of law contrary to the Constitutions of the State of New York, Article I, Section 6, and in violation of the fourteenth amendment to the Constitution of the United States, providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(*b*) Said property being without the State of New York at the time of the death of the decedent and her interest having terminated with her death, the said property was not subject to the taxing power of the State of New York, and the tax placed thereon was contrary to said Article I, Section 6, of the Constitution of the State of
41 New York and said fourteenth amendment to the Constitution of the United States.

Dated New York, November 14th, 1907.

Yours, &c., WILMER & CANFIELD,
Att'ys for Appellants, No. 49 Wall Street, New York City.

To Attorney for the State Comptroller.
Clerk of the Surrogate's Court, Kings County.

Decision of the Surrogate.

Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL OF THE PROPERTY OF *of* SUSAN A. KEENEY, DECEASED, UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY.

Estate of Susan A. Keeney. Order adjusting transfer tax is affirmed.

April 9th, 1908.

H. F. K., *Surrogate.*

42 *Order of Affirmance.*

At a Surrogate's Court of the County of Kings, Held at the Hall of Records, in the Borough of Brooklyn, County of Kings, on the 13th Day of April, 1908.

Present: Hon. Herbert F. Ketcham, Surrogate.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENY, Deceased.

Fred C. Keeney individually, and as administrator of the estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, having appealed to a Surrogate's Court of the County of Kings from the order entered herein on the 24th day of September, 1907, upon the report of the appraiser in the above-entitled matter fixing, assessing and determining the tax on the estate of the above-named decedent at the time of her death.

Now, on reading the petition for the appointment of the appraiser herein filed on the 26th day of June, 1907, and the order appointing an appraiser entered thereon on or about the same day, the report of the said appraiser, the notice of appraisal, the affidavit of Fred C. Keeney verified the 17th day of July, 1907, with the schedules annexed thereto, the affidavit of H. Healy verified the 11th
43 day of July, 1907, and the copy of the deed of trust annexed to the affidavit of said Fred C. Keeney, the affidavit of Arthur B. Smith, verified the 13th day of September, 1907, and the exhibit (letter annexed thereto), all of which said papers are annexed to said appraiser's report and were filed therewith on or about the 18th day of September, 1907; the order assessing tax entered the 24th day of September, 1907, and notice of appeal from said last mentioned order by the petitioners herein, dated the 14th day of November, 1907, and filed in the office of the Clerk of the Surrogate's Court of the County of Kings on or about November 18th, 1907; and

After hearing Messrs. Wilmer, Canfield & Stone for the appellants

herein, and John S. Bennett, Esq., of counsel for the Comptroller of the State of New York, for the respondent,

Now, on motion of John S. Bennett, Esq., attorney for the Comptroller of the State of New York, it is

Ordered that the order appealed from herein entered on the 24th day of September, 1907, be, and the same hereby is, in all respects affirmed.

HERBERT T. KETCHAM, *Surrogate.*

44 *Certificate of Clerk.*

STATE OF NEW YORK,
County of Kings, ss:

I, Edward J. Bergen, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of the notice of appeal, papers, order and decree, in the matter of the appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Susan A. Keeney, deceased, with the originals thereof in this office, and have found the same are true and correct copies of such originals, and the same, with the originals thereof, are all the papers upon which said order and decree was made.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the Surrogate's Court of the County of Kings this 23rd day of April, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

EDWARD J. BERGEN,
Clerk of the Surrogate's Court.

45 *Affidavit of No Opinion.*

Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL OF THE PROPERTY OF SUSAN A. KEENEY, DECEASED, UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY.

STATE OF NEW YORK,
County of New York, ss:

George F. Canfield, being duly sworn, says: I am one of the attorneys and of counsel for the appellants herein. No opinion was rendered by the Surrogate's Court of Kings County in this proceeding.

GEORGE F. CANFIELD.

Sworn to before me this 16th day of April, 1908.

JAMES P. McMANUS,
Notary Public, Kings County.

Certificate filed in New York County.

46 *Order of Affirmance on Appeal from Order.*

At a Term of the Appellate Division of the Supreme Court Held in and for the Second Judicial Department at the Borough of Brooklyn on the 16th Day of October, 1908.

Present: Hon. John Woodward,
" " Almet F. Jenks,
" " Warren B. Hooker,
" " William J. Gaynor,
" " Adelbert P. Rich,
" " Nathan L. Miller,
Justices.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

Order of Affirmance on Appeal from Order.

Fred C. Keeney, individually and as Administrafor, etc., Seth A. Keeney and Angie Keeney Schwegel, appellants in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Surrogate's Court of the County of Kings made on the 13th day of April, 1908, affirming order of
47 September 24, 1907, etc., and the said appeal having been argued by Mr. George F. Canfield of Counsel for the appellants and submitted by Mr. John S. Bennett, of Counsel for the respondent and due deliberation having been had thereon.

It is hereby ordered and adjudged that order of the Surrogate's Court of Kings County so appealed from be and the same is hereby unanimously affirmed with $10 costs and disbursements.

Enter,

ALMET F. JENKS, *Acting P. J.*

48 *Notice of Appeal to Court of Appeals.*

Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL OF THE PROPERTY OF SUSAN A. KEENEY, Deceased, under the Act in Relation to Taxable Transfers of Property.

SIRS: Please take notice that Fred C. Keeney, individually and as Administrator of the Estate of Susan A. Keeney, deceased, Seth A. Keeney and Angie Keeney Schwegel, hereby appeal to the Court of Appeals of the State of New York, from an order entered herein in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Department, on the 16th day of October, 1908, which affirmed an order of the Surrogate's

Court of the County of Kings, entered in said Surrogate's Court on the 13th day of April, 1908, affirming the order theretofore made and entered therein on the 24th day of September, 1907, fixing the tax upon the estate of said Susan A. Keeney, under the Act
49 Relating to Taxable Transfers of Property; and from each and every part of such order of said Appellate Division.

Dated, New York City, November 28th, 1908.

Yours, &c., WILMER, CANFIELD & STONE.
Attorneys for Appellants, No. 49 Wall Street, Borough of Manhattan, New York, N. Y.

To Hon. Herbert T. Ketcham, Surrogate of the County of Kings.
John S. Bennett, Esq., Attorney for the Comptroller of the State of New York.

50 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, Second Department.

In the Matter of THE APPRAISAL OF THE PROPERTY OF SUSAN A. KEENEY, Deceased, under the Act in Relation to Taxable Transfers of Property.

STATE OF NEW YORK,
County of New York, ss:

George F. Canfield being duly sworn deposes and says: That he is one of the attorneys for the appellants in the above entitled proceeding. That no opinion was handed down by the Appellate Division upon the affirmance by it of the order of the Surrogate's Court, New York County, or upon granting of the order of affirmance now appealed from.

GEORGE F. CANFIELD.

Sworn to before me this 30th day of November, 1908.
ARTHUR B. SMITH,
Notary Public, Kings Co.

Cert. filed in New York Co.

51 *Certificate of Clerk of the Surrogate's Court.*

STATE OF NEW YORK,
County of Kings, ss:

I, Edward J. Bergen, Clerk of the Surrogate's Court of said County, do hereby certify, that I have compared the foregoing copy of the notice of appeal to the Court of Appeals, and the order of the Appellate Division of the Supreme Court, in and for the Second Judicial Department, and the notice of appeal, papers, order and decree in the Matter of the Appraisal under the Act in Relation to Tax-

able Transfers of Property of the Property of Susan A. Keeney, deceased, with the originals thereof in this office, and have found that the same are true and correct copies of such originals, and the whole thereof, and the same with the originals thereof are all the papers upon which said order and decree were made.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of Kings this 2d day of December, in the year of our Lord, One thousand nine hundred and eight.

[SEAL.]

EDWARD J. BERGEN,
Clerk of the Surrogate's Court.

52 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol in the City of Albany on the 9th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Nine, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, Presiding; W. H. Shankland, Clerk.

Remittitur February 10th, 1909.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

Be it remembered, That on the 4th day of December in the year of our Lord one thousand nine hundred and eight Fred C. Keeney individually and as administrator, etc., and others the appellants in this proceeding came here into the Court of Appeals by Wilmer, Canfield and Stone their attorneys and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Comptroller of the State of New York the respondent in said proceeding afterward appeared in said Court of Appeals by John S. Bennett his attorney. Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. George F. Canfield of counsel for the appellants, and submitted on the part of counsel for the respondent, and after due deliberation had thereon did order and adjudge that the
53 order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs. And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court of Kings County there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with

costs as aforesaid and hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court of the County of Kings before the Surrogate thereof, according to the form of the Statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogate thereof, &c.

R. M. BARBER,
Deputy Clerk of the Court of Appeals of the State of N. Y.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *February 10th*, 1909.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals with the papers originally filed therein attached thereto.

[GREAT SEAL.] R. M. BARBER,
Deputy Clerk.

54 STATE OF NEW YORK,
Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, deceased, decided by the Court of Appeals on the 9th day of February, 1909, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 16″ day of April, 1909.

[Seal Court of Appeals, State of New York.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the

official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, deceased, decided by the said Court of Appeals on the 9th day of February, 1909, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 17th day of April in the year of one thousand, nine hundred and nine.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals
of the State of New York.

55 In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

(Decided February 9, 1909.)

Appeal from an Order of the Appellate Division, Second Department, Affirming a Decree of the Surrogate of Kings County.

George F. Canfield for appellant.
John S. Bennett & William W. Wingate for respondent.

CULLEN, *Ch. J.:*

This is an appeal from an affirmance of an order of the surrogate of Kings county imposing a transfer tax upon the estate of Susan A. Keeney, a resident of that county, who died in 1907. In June, 1903, the deceased, by a deed of trust, transferred to the Fidelity Trust Company of Newark, New Jersey, certain personal property consisting of bonds and stock upon trust to pay to her during life one-quarter of the income, and the remaining three-quarters to her three children, and after her death to continue to pay the income or transfer the principal to her said children or their issue as in said deed provided. It was not contended before the surrogate that three-fourths of the trust estate, the income of which was payable to the intestate's children, were subject to a transfer tax (Matter of Masury, 28 App. Div. 580), but it was insisted that the remaining one-fourth, the income of which was reserved to the intestate during life, was subject to the tax, and the surrogate so held. From that decree the administrator of the estate appealed.

It is settled by the decisions of this court that under the terms of the statute this share was subject to taxation. (Matter of Green, 153 N. Y. 223, 228; Matter of Brandreth, 169 id. 437; Matter of Cornell, 170 id. 423.) This proposition the learned counsel for the administrator concedes, but at all stages of the proceeding he has challenged the validity of the act, claiming that it is unconstitutional and void. That is the question with which we have now to deal. In entering upon its discussion it must be first borne in mind that the tax sought to be imposed is not a property tax, but in the nature of an excise tax, to wit, on the transfer of property. "A tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition." (Matter of Vanderbilt, 172 N. Y. 69, 74.) It is not an inheritance or succession tax, but it is not necessary that it should be such to support the statute imposing it. In the recent case of People ex rel. Hatch v. Reardon (184 N. Y. 431) the validity of a statute imposing a tax upon the sale or transfer of shares of stock was upheld, and our decision was affirmed by the Supreme Court of the United States (204 U. S. 152). Hence there can be no doubt of the power of the state to impose a tax on transfers of other kinds of property. The appellant does not gainsay this general doctrine, but he urges that the statute now before us is unconstitutional as involving an
56 "arbitrary, discriminatory and unequal tax upon the transfer of property" in two respects. First, that the rate of tax varies according to the relation the grantee bears to the grantor, and, second, that it singles out for taxation, transfers where a life estate is reserved to the grantor, leaving all other transfers or conveyances exempt.

As to the first objection, the grantees in the deed in this case being children of the grantor are subject to the lowest rate of taxation (with the exception of certain exemptions which would not invalidate the law, Beers v. Glynn, 211 U. S. 477), and we cannot see that they have any valid cause for complaint that other grantees are subjected to a higher rate. That objection, if tenable, could be taken only by grantees taxed at the higher rate, and even if good would not render the statute void in entirety. It may be also observed that if the statute is to be construed as applicable only to voluntary transfers or gifts, as to which we express no opinion, the discrimination between relatives and strangers would seem to meet the approval of even the dissenting justice in Magoun v. Illinois T. & S. Bank (170 U. S. 283).

As to the second objection, that the statute taxes transfers only of one character, exempting others, we do not think that the discrimination was so unreasonable that the statute can be pronounced invalid. The right and power of governments to single out certain classes of objects for taxation, leaving other classes exempt or taxed at a different rate, or in a different manner, is unquestionable. (Beers v. Glynn, supra.) Such power has been exercised by all governments from the earliest times. It is subject, however, to the qualification that the classification must not be, as said by Judge Vann in People ex rel. Farrington v. Mensching (187 N. Y. 8, 16),

"so purely arbitrary as to have no reason, not even an insufficient or merely plausible reason, to justify it." We think that there are sufficient reasons to support the classification made by the statute; at least that the classification cannot be said to be devoid of reasonable ground on which to rest. Inheritance tax laws have been very generally adopted throughout the states of the Union. A substantial part of the revenue necessary to support their governments is now derived from that source. A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is the transfer with reservation of a life estate. We think this fact
57 justified the legislature in singling out this class of transfers as subject to a special tax.

It is also urged that the trust property was at the time of the intestate's death in another state with the legal title in the trustee. This does not affect the liability of the transfer to taxation. The liability in this case accrued at the time of transfer, no matter when imposed. The imposition of it after the death of the intestate is in conformity with the practice adopted in the Green, Brandreth and Cornell cases, already cited. It was not claimed that at that time the deceased was not a resident of this state, nor that the property was not within this state, and the transfer here made. The trust deed recites that the grantor was of the borough of Brooklyn. The copy which appears in the record does not contain the signature of the grantor, nor is the acknowledgment filled out, but it would appear from the blank that the deed was to be executed and acknowledged within this state. In the objections filed to the appraiser's report no claim is made to the contrary and we must, therefore, assume that the transfer was made within this state.

The order appealed from should be affirmed, with costs.

Edward T. Bartlett, Vann, Werner, Hiscock and Chase, JJ., concur; Willard Bartlett, J., absent.

Order affirmed.

58 At a Special Term of the Surrogate's Court Held in and for the County of Kings, in the Surrogate's Court Room, in the Hall of Records of the Borough of Brooklyn, City of New York, on the 3rd Day of April, 1909.

Present: Hon. Herbert T. Ketcham, Surrogate.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

On reading and filing the annexed stipulation in the above entitled matter, stipulating for the resettlement of the order of this court dated March 18th, 1909, now,

On motion of Wilmer, Canfield & Stone, the attorneys for the petitioners, it is

Ordered that the said order of March 18th, 1909, be and the same hereby is resettled so as to read as follows:

At a Special Term of the Surrogate's Court Held in and for the County of Kings, at the Surrogate's Court Room, in the Hall of Records of the Borough of Brooklyn, City of New York, on the 18th Day of March, 1909.

Present: Hon. Herbert T. Ketcham, Surrogate.

59 In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

Fred C. Keeney, individually and as Administrator of the Estate of Susan A. Keeney, deceased, Seth A. Keeney and Angie Keeney Schwegel, having duly appealed to the Appellate Division of the Supreme Court, State of New York, Second Department from an order of the Surrogate's Court of the County of Kings entered on the 13th day of April, 1908, which said order affirmed the order theretofore made and entered on the 24th day of September, 1907, fixing the tax upon the Estate of Susan A. Keeney, deceased, under the act in relation to Taxable Transfers of property and the said Appellate Division having by order dated the 16th day of October, 1908, unanimously affirmed the said order appealed from with costs, and the said above named appellants having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein on the 18th day of February, 1909, by which it appears that the said Court of Appeals has affirmed the said order of the Appellate Division, Second Department, with costs to the respondent, and the said order of the Court of Appeals having been remitted to this Court to be enforced according to law, now,

On reading and filing the remittitur of the Court of Appeals herein, and the costs of the said respondent on said appeal
60 having been duly taxed at the sum of One hundred one and 40/100 ($101.40) dollars, and

On motion of John S. Bennett, attorney for the respondent, the State Comptroller, it is

Ordered that said order and judgment of the Court of Appeals affirming the said order of the Appellate Division, Second Department, appealed from be and the same hereby is made the order and judgment of this court, and it is further

Ordered and decreed that the said respondent, the Comptroller of the State of New York, recover of the appellants, Fred C. Keeney, individually and as administrator, Seth A. Keeney and Angie Keeney Schwegel, the sum of One hundred one and 40/100 ($101.40) dollars costs, and that he have execution therefor.

HERBERT T. KETCHAM, *Surrogate.*

61 Surrogate's Court, County of Kings.

In the Matter of THE APPRAISAL UNDER THE ACT IN RELATION TO TAXABLE TRANSFERS OF PROPERTY OF THE PROPERTY OF SUSAN A. KEENEY, Deceased.

Stipulation.

It is hereby stipulated and agreed that the order of the Surrogate's Court of the County of Kings in the above-entitled matter, dated March 18th, 1909, shall be resettled to read in the manner of the copy hereto annexed.

Dated: March 30th 1909.

WILMER, CANFIELD & STONE.
Attorneys for Petitioners.
WM. W. WINGATE.
A. S. F.,
Attorney for the Respondent, the State Comptroller.

[Endorsed:] Surrogate's Court, Kings County. In the Matter of the Appraisal under the Act in Relation to Taxable Transfers of Property of the Property of Susan A. Keeney, Deceased. Copy. Order and Stipulation. Wilmer, Canfield & Stone, Esqs., Attorneys for Petitioners, #49 Wall Street, New York City. Service of a copy of the within order with notice of entry admitted this 10th day of April 1909. Wm. W. Wingate, per A. S. F., Attorney for State Comptroller.

Please take notice that the within is a copy of an order duly filed and entered in the office of the Clerk of the Surrogate's Court of the County of Kings on the 3rd day of April 1909.

Dated New York City April 10, 1909.

Yours, etc., WILMER, CANFIELD & STONE,
49 *Wall Street, Manhattan, New York City.*

To William W. Wingate, Esq., Attorney for State Comptroller.

62 Supreme Court of the United States.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

Assignment of Errors.

Now come Fred C. Keeney, individually, and as Administrator of the estate of the above-named decedent, Seth A. Keeney and Angie Keeney Schwegel, the appellants herein, being all the parties interested in the estate of the decedent above-named, by Wilmer, Canfield & Stone, their attorneys, and in connection with the petition for a writ of error filed herewith, say that in the record and proceedings in this cause and in the final order and judgment made and entered herein on the 3rd day of April, 1909, by the Surrogate's Court of the State of New York for the County of Kings, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I. Error in declining to hold that the Act of the Legislature of the State of New York, approved May 27th, 1893 (Chapter 908, Section 220, Sub-division 3 of the Laws of 1893) entitled "An Act in Relation to Taxation, Constituting Chapter 24 of the General Laws," as amended by the Act of the Legislature of the State of New York, approved April 16th, 1897 (Chapter 284, Section 2 of the Laws of 1897) entitled "An Act to Amend Certain Sections of Article X of Chapter 908 of the Laws of 1896 entitled 'An Act in Relation to Taxation Constituting Chapter 24 of the General Laws' Re-

63 lating to Taxable Transfers of Property," insofar as it and its amendments and re-enactments authorize the assessment imposed by the Surrogate of the County of Kings in the State of New York by an order dated September 24th, 1907 upon a transfer of certain property belonging to Susan A. Keeney, now the decedent herein, and transferred to the appellants herein by a certain trust deed in said order referred to, deprives the petitioners, the appellants herein, of their property, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

II. Error in declining to hold that such legislative enactment, insofar as it authorizes the said assessment, denies to said appellants the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

Dated: April 14, 1909.

WILMER, SANFIELD & STONE,
Attorneys for Petitioners, #49 Wall Street, Manhattan, New York City.

[Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, Deceased. Assignment of Errors. Wilmer, Canfield & Stone, Attorneys for Petitioners, #49 Wall Street, Manhattan, New York City.

64 In the Supreme Court of the United States.

In the Matter of THE TRANSFER TAX UPON THE ESTATE OF SUSAN A. KEENEY, Deceased.

Bond for Damages and Costs.

Know all men by these presents: That we, Fred C. Keeney, of the City of New York, as Principal, and The United States Fidelity and Guaranty Company, a Corporation organized under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty Street, in the City of New York, as Surety, are held and firmly bound unto the Comptroller of the State of New York, in the sum of five hundred dollars ($500), lawful money of the United States of America, to be paid to the said Comptroller of the State of New York, for the payment of which well and truly to be made, the said Fred C. Keeney binds himself his heirs, executors and administrators, and the said The United States Fidelity and Guaranty Company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 15th day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, Fred C. Keeney, individually and as Administrator of the estate of the above named decedent, Seth A. Keeney and Anjie K. Schwegel, Appellants in the above entitled matter seek
65 to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by the Surrogate of the County of Kings, State of New York, on a remittitur from the Court of Appeals of the State of New York;

Now, therefore, the condition of this obligation is such, that if the above named Appellants shall prosecute their writ of error to effect and answer all damages and costs, if they shall fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FRED C. KEENEY. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:
[SEAL.] GEORGE E. HAYES, *Attorney-in-Fact.*

Sealed and delivered and taken and acknowledged this 15 day of June, 1909, before me

ARTHUR B. SMITH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

66 *Affidavit, Acknowledgment and Justification by The United States Fidelity and Guaranty Company.*

We Will Bond You.

Fidelity, Judicial, Burglary, Contract.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Fred C. Keeney, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Fred C. Keeney is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 15 day of Jun- 1909.

DANIEL C. DEASY,
Notary Public, New York County.

67 [Endorsed:] In the Supreme Court of the United States. In the Matter of The Transfer Tax upon the estate of Susan A. Keeney, deceased. Bond for Damages and Costs. This bond approved this 16 day of June 1909. (Sd.) Edgar M. Cullen, C. J. Ct. App. St. of N. Y.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Comptroller of the State of New York and John S. Bennett, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the City of Washington in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Surrogate's Court of the State of New York for the County of Kings, in a proceeding wherein Fred C. Keeney, individually and as administrator of the Estate of Susan A. Keeney, deceased, Seth A. Keeney and Angie Keeney Schwegel are the appellants, and you are the respondents, to show cause, if any there be, why the judgment and order rendered against the said appellants as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edgar M. Cullen, Chief Justice of the Court of Appeals of the State of New York, this 16th day of June, in the year of our Lord Nineteen hundred and nine.

EDGAR M. CULLEN,
Chief Justice of the Court of Appeals of the State of New York.

Attest:

[Seal Court of Appeals, State of New York.]

R. M. BARBER,
Clerk Court of Appeals.

69 I, the undersigned, attorney of record for the respondents in the above entitled matter, hereby acknowledge due service of the above citation & a copy of the writ of error this 17th day of June 1909, and enter an appearance for said respondents in the Supreme Court of the United States.

WM. W. WINGATE,
Attorney for the Respondent, the Comptroller of the State of New York.

70 [Endorsed:] Supreme Court of the United States. In the Matter of the Transfer Tax upon the Estate of Susan A. Keeney, Deceased. Citation. Wilmer, Canfield & Stone, Esqs., Attorneys for Appellants, #49 Wall Street, New York City.

Endorsed on cover: File No. 21,741. New York, Kings County, Surrogate's Court. Term No. 81. Fred C. Keeney, individually and as administrator of the estate of Susan A. Keeney, deceased; Seth A. Keeney, and Angie Keeney Schwegel, plaintiffs in error, vs. The Comptroller of the State of New York. Filed July 2d, 1909. File No. 21,741.

In the Supreme Court of the United States,

OCTOBER TERM 1911.

Office Supreme Court, U. S.
FILED.
NOV 28 1911
JAMES H. McKENNEY
CLERK

No. 81.

FRED C. KEENEY, individually and as Administrator of the Estate of SUSAN A. KEENEY, deceased, SETH A. KEENEY and ANGIE KEENEY SCHWEGEL,

Plaintiffs-in-Error,

vs.

THE COMPTROLLER OF THE STATE OF NEW YORK,

Defendant-in-Error.

BRIEF FOR APPELLANTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911—No. 81.

FRED C. KEENEY, individually and as Administrator of the Estate of Susan A. Keeney, deceased, Seth A. Keeney and Angie Keeney Schwegel, Plaintiffs-in-Error, against THE COMPTROLLER OF THE STATE OF NEW YORK, Defendant-in-Error.	Appeal from New York Court of Appeals.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from an order of the Surrogate of the County of Kings, State of New York, imposing a tax upon certain property of Susan A. Keeney, the deceased, under a provision of the Tax Law generally known as "The Inheritance Tax Law"; the property taxed being located in the State of New Jersey at the time of decedent's death, having been transferred by her to a trustee

in New Jersey for the three appellants (two of whom were not residents of New York) before her death by a valid deed passing title *inter vivos* and in no way taking effect as a testamentary conveyance.

The case comes into the Supreme Court upon a writ of error to the Surrogate's Court of the County of Kings and State of New York to review the order of the said Surrogate's Court dated the third day of April, 1909 (p. 34). The said order was entered upon the remittitur of the Court of Appeals of the State of New York (pp.29-30), which affirmed the order of the Appellate Division of the Supreme Court, Second Department (p. 27), which last order affirmed the order of the Surrogate of Kings County dated April 13th, 1908 (pp. 25-26). This order of the Surrogate just referred to affirmed the order of the Surrogate dated September 24th, 1907 (p. 23) and approved the assessment of the tax in question.

The circumstances of the case are as follows: On June 30th, 1903 Susan A. Keeney, the deceased, a resident of the State of New York, executed and delivered a certain trust deed (pp. 12-17) to the Fidelity Trust Company of Newark, N. J. This deed was made nearly four years before her death and at a time when she was in perfect health (pp. 7 and 8). By it she transferred certain property to the Trust Company upon trust to hold the same during her life and to pay one-fourth of the income during her life to herself, and the remaining three-fourths of the income to her three children, the plaintiffs herein, two of whom were not residents of New York, one of them being a resident of California, and the other a resident of Austria. After her death the entire income was to be paid or the

principal transferred to the said children or otherwise, as provided in the deed of trust.

The inheritance tax law, insofar as it relates to this case, reads as follows:

> "A tax shall be and is hereby imposed upon the transfer of any property, real or personal * * * or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:
>
> * * * * * * *
>
> "(4) When the transfer is of property made by a resident or by a non-resident, when such non-resident's property is within this State, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or *intended to take effect in possession or enjoyment at or after such death*" (Laws of 1896, Chap. 908 as amended).

No attempt was made to subject the three-fourths portion of the principal of the trust fund of which the children received the income during Mrs. Keeney's life, to the payment of the tax, that part being governed by the rule in *Matter of Masury*, 28 N. Y. App. Div., 580, affirmed 159 N. Y., 532. It is to be noted that this attempt was not made, and the rule of that case, it was conceded, applied although such three-fourths of the principal could not come into the possession of the donees until after the death of Mrs. Keeney. It was contended and was held, however, that one-fourth of the principal of the trust fund was subject to the tax, for the reason that Mrs. Keeney

had reserved for herself one-fourth of the income thereof for life, the appraiser reporting that Mrs. Keeney had transferred such one-fourth of the principal "intending the transfer to take effect at her death." (See Appraiser's Report, p. 19, at p. 22, see also order fixing tax, p. 23.)

Errors Relied Upon.

The ground of appeal to this Court is, as stated in the writ of error (p. 2) and set forth at length in the assignment of errors (p. 36), that the said inheritance tax law as interpreted and enforced by the courts of the State of New York, in so far as it authorizes the assessment of a tax upon the transfer of certain property made by Susan A. Keeney, the decedent, to these appellants, by a certain trust deed hereafter referred to, is unconstitutional, being in contravention of the Fourteenth Amendment of the Constitution of the United States, in that (1) it deprives the appellants herein of their property without due process of law, and (2) denies to said appellants the equal protection of the laws.

Our argument in substance is as follows:

(1) Assuming for the purpose of argument that the Court of Appeals was right in saying that the State was taxing a *transfer* of property (we contend that the Court was in error in this), the transfer in this case was strictly a conveyance *inter vivos* and was in no sense testamentary. The tax must therefore be sharply distinguished from an

inheritance tax.

(2) A tax upon the special form of transfers *inter-vivos* covered by this act is unconstitutional because arbitrarily discriminatory and not based upon any legal or natural classification which bears any legally reasonable relation to the subject, because

(3) The tax in this case upon all remainders limited to take effect in possession after the death of the grantor is not imposed under the taxing power proper of the State, and cannot be upheld as an exercise thereof, and further, because it is based upon a classification which has no reasonable relation to taxation.

(4) The tax cannot be upheld under the general regulative or police power of the State because it is not imposed for the purpose of regulating or promoting any of those interests of society which may be regulated or promoted under the police power.

(5) The assumption so far made—that this is a tax upon the *transfer of property* is contrary to fact. The section of the act in question in reality imposes a tax upon property in connection with the *coming into possession* of it.

(6) A tax upon the *coming into possession* of property is unconstitutional because it deprives appellants of their property without due process of law, and denies to them the equal protection of the laws.

(7) The tax upon the *coming into possession* of the property in this case is also bad because the property was situated and coming into possession took place in New Jersey, and of the three persons beneficially interested in the property two were non-residents of the State of New York, one, Seth A. Keeney, being a resident of California, and the

other, Angie Schwegel, being a resident of Austria, the state therefore had no jurisdiction over such property.

I.

Assuming for the purpose of argument that the Court of Appeals was right in saying that the State was taxing a transfer of property (an assumption contrary to fact as hereinafter contended), the transfer in this case was strictly a conveyance "inter-vivos," and was in no sense testamentary. The tax must therefore be sharply distinguished from an inheritance tax.

Ridden v. Thrall, 125 N. Y. 572.
Basket v. Hassell, 107 U. S. 602.
Knowlton v. Moore, 178 U. S. 41.
United States v. Perkins, 163 U. S. 625.
Matter of Brandreth, 169 N. Y. 437.
Billings v. Illinois, 188 U. S. 97.
Matter of Pell, 171 N. Y. 48.

It is obvious from the fact that the transfer was made by deed and not by will, that if it can be regarded in any sense as testamentary, it must be upon the ground that it was of the sort known as a transfer *causa mortis*, that is, made in contemplation of death.

To constitute a transfer *causa mortis*, it is essential that the element of consciously impending death should exist. Such a transfer lapses or is divested in case the transferor survives the apprehended peril.

Ridden v. Thrall, 125 U. S. 572, 579 (1891):

> "But in the case of gifts *causa mortis* more is needed (than in gifts *inter-vivos*). The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by recovery from the disease or escape from the peril."

See also

Basket v. Hassell, 107 U. S. 602 (1882).

This principle is so well known and recognized in the law, that it is quite unnecessary to dwell upon it here. Applying it, however, to our case, it is at once apparent that the transfer made by Mrs. Keeney was not one made in contemplation of death, *i. e., causa mortis.* She transferred the property by a deed on June 30th, 1903, and there was at that time no particular or imminent fear of present death. On the contrary, she was in good health and had been so for some time (pp. 7 and 8). She lived for nearly four years afterward, or until March 29th, 1907 (p. 7).

It is clear, therefore, that the rights of every one so far as the property in question was concerned, were vested long before her death. They became vested as soon as she executed and delivered the deed, and her death had no effect and was a matter of no consequence so far as the creating of any rights or the vesting of any interests was concerned. Under and by virtue of that deed, her children acquired a beneficial life interest together with a vested remainder in three-fourths of the property as soon as the transfer took place, and also a vested remainder in the other

one-quarter, dependent on her beneficial life interest therein, which, of course, terminated at her death.

That this is the law of New York State is shown by the case *in re Brandreth* (169 N. Y. 437), where the Court of Appeals had before it a transfer in which a life estate was reserved for the transferror, the case being almost identical with our case. The Court decided that the transfer was subject to the tax, but there was no intimation of the constitutional question at any stage of the proceedings. Regarding the nature of the interests created, for which point we cite the case, the Court said at pp. 441, 442:

> "In this State a life estate and remainder can be created in a chattel or a fund the same as in real property. Though a remainder may vest in title at its creation, it cannot vest in possession until the determination of the prior estate. It makes no difference in this respect whether the remainder is vested indefeasibly, or is contingent or subject to be divested. In the present case, the prior estate is one for the life of the donor, and therefore the remainder transferred to his daughters falls exactly within the provision of the statute as a transfer to take effect in possession or enjoyment on the death of the donor."

In the case at bar, as we have stated, the transfer was one *inter-vivos* and consequently the tax which is sought to be imposed is not in any sense an *inheritance* tax. This much is admitted in the opinion of Chief Justice Cullen of the Court of Appeals.

> "It is not an inheritance or succession tax, but it is not necessary that it should be such to support the statute imposing it." (Opinion, p. 32.)

The tax in question, instead of being an inheritance tax of any sort whatever, is claimed by the Court to be a tax imposed upon the transfer of property by deed *inter-vivos.*

> "In entering upon its discussion, it must be borne in mind that the tax sought to be imposed is not a property tax, but in the nature of an excise tax, to wit, on the transfer of property." (Opinion, p. 32.)

This point being established, it necessarily follows that the section of the transfer tax law which relates to our case must be examined by itself and that it cannot be justified upon the privilege theory upon which inheritance taxes are based, for it does not impose an *inheritance* tax.

Inasmuch, therefore, as there is no need of discussing an *inheritance* tax, we will not refer further to the theory of such taxes. That subject is discussed in the cases of

Knowlton v. Moorse, 178 U. S. 41 (1899).
U. S. v. Perkins, 163 U. S. 625 (1896).
Billings v. Illinois, 188 U. S. 97 (1903).

It may not be amiss to point out, however, that while a discrimination in the rate of the tax between lineals and collaterals and other discriminations may be proper in *inheritances* taxes, such discriminations are unconstitutional when applied to direct taxation.

Matter of Pell, 171 N. Y. 48 at p. 60 (1902).

(As we said before, we assume for the purpose of argument that the Court of Appeals was right in saying that the tax is a *transfer* tax. We contend, however, that the Court of Appeals was mistaken in declaring that this was a tax upon a *transfer* of property, and that instead of its being a tax upon a *transfer*, it was a tax upon the *coming into possession of the property.*)

II.

A tax upon the special form of transfers inter-vivos covered by this Act is unconstitutional because arbitrarily discriminatory and not based upon any legal or natural classification bearing any legally reasonable relation to the subject.

Nichol v. Ames, 173 U. S. 509.

The right to transfer property *inter-vivos* differs from the right to transfer it by will or an instrument in the nature of a will. The former is a fundamental and inalienable right. It is a necessary and inherent incident of property, whereas the right to dispose of property by will is neither naturally inherent, nor has it always existed. There has been and still is a sharp contrast between the two. Transfers by will or intestacy have always been regarded as requiring some special exercise of control on the part of the state and as being in a very real sense a privilege. There are

at the present time limitations, and there were formerly many restrictions upon one's liberty of freely disposing of one's property after death.

The right to transfer *inter-vivos* being inherently an incident of ownership, a tax imposed upon the exercise of the right of alienation or upon the enjoyment of that incident of property, is necessarily and effectually a tax *upon the property itself.*

Nichol v. Ames, 173 U. S. 509 (1899).

In that case this Court considered the constitutionality of a federal tax upon sales made at exchanges or boards of trade. The Court said (p. 519):

> "We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the Act."

By the decision that it was a tax on a privilege, the case becomes analogous to inheritance tax cases. The Court continued at page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded.*"

By this last language italicized the Court supports our contention that a tax upon all transfers

inter-vivos is not a privilege tax, but is really a *property tax*. It, therefore, further supports the distinction which we have drawn between *inheritance* taxes and taxes upon transfers *inter-vivos*.

Now we admit that a tax may be imposed on property in connection with its transfer, but such a tax can, so far as we can see, be upheld on the part of the state upon only two grounds:

(1) The general taxing power of the state; and

(2) The general regulative or police power of the state.

Under the first, the object is to raise money for the support of the Government, the sole reason and the justification of the tax being the necessity of the Government to raise funds to provide for its expenses and obligations.

Under the second, the object is to regulate, the reason and justification of the tax being primarily to promote the welfare of the people, for whose interests the Government exists, and only incidentally to raise money.

It has often been said that the power to tax is the power to destroy. But when the state destroys by the imposition of a prohibitive money burden, it destroys under its police power, not under its taxing power. An import duty of 200% *ad valorem* is not in substance a tax, although the revenue derived from such importations as might take place would help to pay the public debts. The high license upon the sale of liquor produces revenue as well as any other, but it would never be justified without resort to the police power of the state. This method of regulation is popular and excellent, because incidentally it yields money which, without it, would have to be otherwise provided, but it is only incidentally taxation. It is

in substance regulation, universally recognized to be so, and upon no other ground than the police power are such statutes to be upheld.

The distinction between these two powers of Government is not easy to define abstractly. Genuine taxes may be high at one time and low at another, and regulative measures may be large revenue producers. In concrete cases, however, the difficulty generally disappears, and it is not difficult to tell in a particular case upon which basis a particular act rests. In determining this question, courts always look at the substance of things, not at their form.

Now, if a tax cannot be upheld under either one or the other of these powers, namely, the taxing power or the police power, it cannot be upheld at all. For, there is no othe rtaxing power separate and distinct from these two powers, nor can the Legislature acquire any different or greater power from the union of these two powers.

III.

The tax in this case upon all remainders limited to take effect in possession after the death of the grantor is not imposed under the taxing power proper of the State, and cannot be upheld as an exercise thereof because it is based upon a clasification which has no reasonable relation to taxation.

Frazer v. McConway & Torley Co., 82 Fed. 257.

Hatch v. Riordan, 184 N. Y. 431.
Hatch v. Riordan, 204 U. S. 152.
Farrington v. Mensching, 187 N. Y. 8.
Matter of Brandreth, 169 N. Y. 437.

For the purposes of raising money, it has often been said that there is in the law no iron-clad rule of equality. The Legislature may unquestionably tax some property and not other. It may classify and impose taxes within certain limits upon variously formed groups or classes. But, in the exercise of its power, it must never be forgotten that the object of such classification by the Legislature is *the raising of money,* and all such classification must be viewed in the light of that object. It must be reasonably conducive to the accomplishment of that object, or reasonably framed with respect to the accomplishment of it. The matter is not settled by showing that there are in existence natural distinguishing marks which enable one in a way to point to a ready made class. The classification must, in addition to being a possible and practicable one, also bear a reasonable relation to the matter of taxation. In other words, it must be a reasonable *tax* classification. That is, it must appear that the picking out of that class *for the purpose of taxing it* is on the whole reasonable.

It is, of course, not easy to define in precise terms the test for determining the reasonableness of a tax classification, but it is comparatively simple to determine in each particular case whether a particular classification is or is not reasonable. For example, you may make arbitrarily a classification of all white horses or all black cattle or all redheaded persons, but all mankind would agree that a tax upon all white horses or all black cattle

or all redheaded persons would be invalid because, although the classification in each case is a possible and practicable one, it is not a reasonable *tax* classification considered with respect to the purposes and objects of taxation. Again, you may make arbitrarily a classification of all "unnaturalized foreign adult males," but in *Frazer v. McConway & Torley Co.*, 82 Fed. 257, it was held that a tax upon all unnaturalized foreign adult males, in connection with their employment, was unconstitutional, such a grouping or classification not being a reasonable one for the purposes of taxation.

Similarly, you may make arbitrarily a classification of all remainders limited to take effect in possession or enjoyment after the death of the grantor, but a tax upon such remainders is unconstitutional and invalid because, although it is perfectly possible arbitrarily to distinguish and mark off such remainders from other remainders, it is a purely arbitrary classification, and has no reasonable relation to the purposes and objects of taxation.

The distinction again is well shown by the contrast between the cases of *Farrington v. Mensching*, 187 N. Y. 8, and *Hatch v. Riordan*, 184 N. Y. 431; 204 U. S. 152. In each case the Legislature of New York imposed a tax upon transfers of stock. In each case that tax was imposed regardless of the actual or market value of the stock transferred, but in the *Farrington* case the Legislature also ignored the question of the par value of the stock, and taxed a transfer of a share of the par value of ten dollars the same as it taxed the transfer of a share of the par value of one hundred dollars.

The Court of Appeals held that in this the Legislature had gone too far; that it had exceeded the limits of reasonable *tax* classification, and declared the Act unconstitutional. In the second case, in which the Act took account of the *par* value of the stock transferred, the tax was upheld. To classify according to par values regardless of actual values, it might be contended, is not reasonable, but the New York Court of Appeals and this learned Court thought that it would be a matter of too much difficulty and uncertainty to inquire in each instance into the actual value of the stock transferred, and that, as tax assessments must generally be to a considerable degree summary, it was reasonable for the Legislature to disregard the element of actual value, and not to require some more formal inquiry into and determination of that feature. As, however, par values were shown by the face of the certificates, and as it may be thought that corporations endeavor to issue stock with a view to at least approximate equality between par and actual value, it did not exceed the limit of reasonable *tax* classification, so long as this element of par value was regarded.

We submit, therefore, that the view adopted by Judge Cullen in this case in referring to the necessary elements of valid classification, namely, that a classification is valid if it has merely a plausible reason to support it (Opinion, p. 33), is unsound, because it does not consider or place any limit upon the kind of so-called plausible reasons which must exist. Properly limited, this statement may be said to approach the truth, but used in the absolute and sweeping manner in which it is used in the opinion, it comes very far from properly expressing the real qualities of valid tax classifica-

tion. Used as it is, the statement is wholly inadequate. It should also be borne in mind that Judge Cullen drew the statement from an opinion which declared a tax law *unconstitutional*, and that it was used as a part of the argument leading to such a result, whereas he relies upon it as justification for upholding the tax statute.

Transfers of property, such as the transfer in this case, namely, transfers with a reservation of a beneficial interest for the life of the grantor, it is submitted, do not constitute a reasonable *tax* classification within the foregoing principles and authorities. Such transfers, both of personalty and realty, are and practically always have been lawful and valid in New York, though extremely uncommon.

> *Matter of Brandreth*, 169 N. Y. 437, *supra*.

They are not, however, different in any essential respect from other transfers *inter-vivos*. They are not unique in any way. There is nothing to distinguish them in their essential nature from transfers by A to B for the term of B's life, remainder to C, or indeed, from transfers in which the fee is not split up into a life estate and remainder at all. The right to make such a transfer is therefore just as much an incident of ownership, and is just as much the creature of the common law as are other and more common conveyances. Such transfers are not confined to any particular species of property, but are used in all forms of property, both realty and personalty. It is to be noted also that, according to the terms of the statute in question, the tax upon these trans-

fers *is not limited to cases where the transferror reserves the income for himself for life;* it applies with equal effect, for example, to a transfer by A to B for the life of A, remainder to A and his heirs, or a conveyance by A to B for the lives of A and B or the survivor of them, remainder to A and his heirs, or to a conveyance by A to B for the life of A, remainder to C, for in all these cases the remainder is not intended to take effect in possession or enjoyment until after the death of the transferror.

It is apparent, therefore, that the classification is not established upon the principle that the tax is to apply solely to a case where the deed reserves the enjoyment of the property *to the grantor* for the period of his own life. There is nothing, consequently, in the classification which is created, which bears any relation whatever to the matter of death taxes. As a classification, it bears no *reasonable* relation to the matter of taxation at all. Practically nothing could be raised by such a tax, and as for saying that it is a natural and reasonable tax classification, it is no more so than would be a tax upon the transfer of all white horses, all black cattle, all readheaded men, and it is much less so than would be a tax upon all unnaturalized foreign males. Indeed, the Court of Appeals, as we interpret its opinion, in effect admits that the tax in question cannot be justified under the *taxing power* proper of the State, and therefore, it upholds it and is compelled to uphold it under the general regulative or police power of the State.

This brings us to the consideration of the question whether it can be upheld under that power.

IV.

The tax cannot be upheld under the general regulative or police power of the State, because it is not imposed for the purpose of regulating or promoting any of those interests of society which may be regulated or promoted under the police power.

Barbier v. Connelly, 113 U. S. 27.
Mugler v. Kansas, 123 U. S. 623
Matter of Graves, 52 N. Y. Misc. 433.
Matter of Edgerton, 35 N. Y. App. Div. 125, aff. 158 N. Y. 671.

If the tax in question as a tax upon property or the transfer thereof, cannot be justified under the taxing power proper, then it is only under the general regulative or police power of the state that it can be upheld, for these are the only two sources of power of taxation possessed by the Legislature. The Court of Appeals, recognizing, as we have already stated, that the tax in question cannot be justified under the taxing power proper of the State, since the statute in question is not based upon a reasonable classification for the purposes of taxation, has upheld the tax as justified under the general regulative or police power of the State. The Court of Appeals says that the tax in question is justified as an aid to the main feature of the law, namely, the genuine inheritance tax law.

> "We think that there are sufficient reasons to support the classification made by this stat-

ute; at least that the classification cannot be said to be devoid of reasonable ground on which to rest. Inheritance tax laws have been very generally adopted through the states of the Union. A substantial part of the revenue necessary to support their governments is now derived from that source. A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may have, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute which is challenged it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is the transfer with reservation of a life estate. We think this fact justified the legislature in singling out this class of transfers as subject to a special tax" (Opinion, p. 33).

The Court thus, in effect, says that this statute, although not based upon a reasonable classification for the purpose of raising taxes, is based upon a reasonable classification for the purpose of accomplishing something else. We have, says the Court, a real system of inheritance taxes. We mean to collect all the money we can in this way, and we mean to allow just as few as possible to dispose of their property otherwise than by will. If transfers of remainder interests to take effect in possession and enjoyment after the death of the person transfer-

ing the interests are permitted untaxed, people will resort to that method, so that they shall not die owning anything upon which an inheritance tax can be levied. In other words, we will bar this path and make it very expensive, so that people will travel the path upon which they shall be taxed.

We respectfully submit that this line of reasoning is entirely untenable:

A. Because such an object does not come fairly within the scope of the regulative or police power of the state.

B. Because the Act in question is not limited to cases having any connection at all with the subject of inheritance taxation.

C. Because the statute in question, even if limited to cases which might be availed of for the purpose of escaping taxation, would be entirely ineffective and useless to prevent the accomplishment of such a purpose.

A.

A person has two methods of disposing of his property so as to give the benefit of it to another person after his death: One is by means of a transfer *inter vivos* with the reservation of a life estate in the grantor, and the other is by means of a transfer by will. If it is conceded that a transfer *inter-vivos* with the reservation of a life interest in the grantor is not subject to a tax under the taxing power proper of the state, as we maintained under Point III, can it be subject to a tax under the police or regulative power of the state solely upon the ground that, if it is not so taxed, it may escape altogether the inheritance tax?

We submit (1) that the Legislature cannot under the general regulative or police power tax any person or thing which it cannot tax under its taxing power proper, unless it can be shown that the tax in question is reasonably framed for the purpose of carrying into effect some one of the legitimate objects of the police power, and (2) that the police power does not comprehend among its objects that of simply taxing something which the state might not otherwise be able to tax.

As we have seen, all mankind would agree that a tax upon all white horses or all black cattle or all red-headed persons would be invalid under the taxing power proper of the state. It is equally clear that a tax upon these various groups or classes would be invalid under the police power, unless it can be shown that the public welfare could in some way thereby be reasonably promoted. If, for instance, it should be discovered that black cattle are specially susceptible to Texas fever, or that red hair is a specially fertile medium for propagating and transmitting the germs of tuberculosis or typhoid fever, some regulation of black cattle or red-headed persons might be justified under the police power, but if there is no such reason, and the only reason for taxing them is a desire on the part of the state to tax something which might otherwise escape taxation, the action of the state could not be justified under the police power. It would be taxing or regulating the blackness of the cattle or the red-headedness of people. And, in general, our contention is that the legislature under its police or regulative power cannot arbitrarily impose a tax upon any person or thing in respect to some quality or characteristic which is not taxable directly or indirectly, solely for the purpose of pre-

venting such person or thing from escaping taxation of some other sort.

Suppose there are two roads from A to B, one free and upon which a toll proper cannot be collected; the other, a toll road, shorter and more convenient. Is it possible, by any course of reasoning, to argue that a charge can be collected on the first road under the police power, because if none is collected, some people will choose to go from A to B by that road rather than by the toll route?

Suppose, as a result of its system of inheritance taxation, the State of New York should discover that residents of New Jersey who have heretofore kept their property in New York were removing that property to New Jersey, could the State of New York impose a tax upon the removal of that property upon the residents of New Jersey who had removed it solely because otherwise a large mass of property might escape taxation?

Suppose it should become the practice of wealthy men to make absolute gifts to their families of a large part of their property after they attain sixty years of age. Could it be contended that the legislature could impose a discriminatory tax in the nature of an inheritance tax upon all such donations of property made after the donor had attained sixty years of age?

The general power of the government to regulate commonly called the police power, broad as it is, has some limits, and it cannot be exercised to the impairment of fundamental rights of citizens, unless you can point to some legitimate object for the exercise of it. It is always the interest of the public or some part of it that is considered and the act of regulation must have some reasonable relation to one of these objects. In *Barbier v. Connelly*, 113 U.

S. 27, at page 31, *supra*, this Court defines this power as the power "to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." Whatever form the exercise of this power may take, whether it be the prohibition of immoral books, pictures or exhibitions, requiring half railway fares for school children, the regulation of the quality of food, the protection of childhood, automobile licenses, liquor licenses and other similar regulations, it is always the interest of the public or some part of it that is considered, and that must be involved as the objective. And tested by this rule, we respectfully submit that the act in question falls outside of the broad field of this power and that it must be declared invalid because it has no reasonable relation to the promotion of the moral, intellectual, physical or material well being or other interests of the public. Remainders created to take effect in possession or enjoyment after the death of the grantor of the remainder do not affect at all the interests of the public. They do not affect the interests of the public any more than do black cattle, white horses or red-headed persons. They affect the interests of the public much less than do unnaturalized foreign males. The only reason for taxing them, therefore, is because otherwise they might escape taxation altogether.

But this is not one of the legitimate objects of the police power, and yet it is the only object relied upon by the Court of Appeals, the act in question being justified solely on the ground that it was an aid to the enforcement of the inheritance tax law.

In *Mugler v. Kansas*, 123 U. S. 623, *supra*, this learned Court said at page 661:

> "If, therefore, a statute purporting to be enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so judge and thereby give effect to the constitution."

This language applies with striking pertinency to the case at bar. We have a statute said in effect by the Court of Appeals to be enacted in the exercise of the police power, and therefore, if such a statute "has no real or substantial relation to those objects" which may legitimately be accomplished by the police power, "or is a palpable invasion of rights secured by the fundamental law," it is the duty of the courts to so judge and thereby give effect to the constitution."

B.

As we have already pointed out, the act in question is not limited to transfers of remainders by A with a reservation of a life interest in A. It applies to all transfers intended to take effect in possession or enjoyment after the death of the transferror, including transfers where the transferror reserves no interest whatever to himself. It would apply, therefore, to a transfer by A to B for the life of A, but for the use of B, remainder to C. Such a transfer would never be resorted to for the purpose of escaping an inheritance tax, and yet if the tax in this case can be upheld, the tax in such a case would have to be upheld, that is, a tax imposed arbitrarily without any conceivable relation to any legitimate object that may be accomplished

by the power of government. It thus appears, if the purpose of the legislature was, as held herein by the Court of Appeals, to aid the enforcement of the inheritance tax law, the act in question goes far beyond it, since the act is not limited to those cases where the enjoyment of the life interest is reserved to the grantor, but includes all cases where a transfer is made with a remainder to take effect in possession or enjoyment after the death of the grantor, although the grantor himself reserves no interest for himself in the property. In other words, it would apply to cases which would never be resorted to for the purpose of evading an inheritance tax. If, then, a tax upon remainders can be supported only upon the ground of aiding the inheritance tax, the statute in question cannot be upheld, since it may be applied to cases having no connection whatever with inheritance taxation. In so far as it may be so applied, the statute in question is without any basis whatever, and this being so, the statute as a whole must be declared invalid, because there is no possibility of separating so much of the statute as is connected with inheritance taxation from that part which has no connection with it whatever.

We submit, therefore, that even if the reasoning of the Court of Appeals could be upheld as applied to a very limited class of cases, the statute in question cannot be upheld as a whole and an amendment of it becomes necessary in any case.

C.

It is not true that transfers *inter-vivos* with the reservation of a life estate are in danger of being resorted to as a way of escape from inheritance

taxes. They existed before the tax was imposed, and they exist now, since it has been imposed. They have never been common. Whether any substantial increase will take place in their numbers, in case the burden of the tax be removed, can hardly be determined, except by looking at equally simple ways in which the inheritance tax can be avoided, and inquiring whether such methods have become common or have been resorted to in any considerable numbers for that purpose. If people do not seek out other easy ways of escape in great numbers, it is entirely reasonable to suppose that they will not make this a way of escape.

There are many ways in which, in popular language, inheritance taxes can be escaped, other than by a present gift passing both title and enjoyment. Perhaps the simplest way is by creating a joint estate with the right of survivorship. If one person wishes to leave property to another without paying inheritance taxes, for example, husband and wife, brother and sister, father and child, he can very simply create a joint estate with right of survivorship. The survivor takes the whole property without the payment of any inheritance tax.

> *Matter of Graves*, 52 N. Y. Misc. 433 (1907).

And such survivor is free to dispose of it as he wishes, and he can create another joint estate, if he wishes to do so. If the giver wants to retain practically complete control, he can take a covenant from his co-tenant to convey the interest back to him upon request, and can retain possession of the property as security for the covenant. Practically speaking, this plan is entirely feasible

in most cases. It is less expensive than a trust and does not necessitate turning over the management of property to a trustee. Yet, as a means of escape from inheritance taxes, it has not been made use of to any appreciable extent. Certainly the Legislature has not felt the need of imposing a tax upon this lawful form of transfer, in order to force submission to the interitance tax law.

Other ways of escape are readily available. A person can transfer property *inter-vivos,* taking a bond conditioned upon the payment of an annual sum for life, and this annual sum can be figured as the income of the property transferred. The property may then be pledged as collateral to the bond.

Matter of Edgerton, 35 N. Y. App. Div. 125; affd. 158 N. Y. 671.

Undoubtedly other ways are available. We refer to these because they have been referred to within our knowledge as ways of escape. We have never heard the complaint made that they must be stopped, lest the income of the state from inheritance taxes should cease.

V.

The assumption so far made, that the tax herein complained of is a tax upon the transfer of property, is contrary to fact. No such tax was imposed in this case, and the section of law under which the tax was imposed does not in effect provide for a tax upon "a transfer" of property, but only upon "a coming into possession" of property previously transferred.

Matter of Gould, 156 N. Y. 423.
Mugler v. Kansas, 123 U. S. 623
Yick Wo v. Hopkins, 118 U. S. 356.
Soon Hing v. Crowley, 113 U. S. 703.
Neal v. Delaware, 103 U. S. 370.
Ex parte Virginia, 100 U. S. 339.
Re Seaman, 147 N. Y. 69.
Ex rel. Hatch v. Riordan, 184 N. Y. 431.
Ex rel. Farrington v. Mensching, 187 N. Y. 8.
Matter of Brandreth, 169 N. Y. 437.

"Transfer," as used in this law and in this brief, is used in "its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter" (*Matter of Gould*, 156 N. Y. 423, at page 428).

In the case at bar the transfer of property took place in 1903, when Mrs. Keeney, the owner of the

property, delivered it to the New Jersey trustee for these appellants with the intent of passing the rights which she had in it to them. And, if this "transfer" were subject to a tax under this law, it was subject to a tax at that time, namely, in 1903. And so Judge Cullen apparently held: "The liability in this case *accrued at the time of the transfer*" (Opinion, p. 33). But, as a matter of fact, the tax was calculated and imposed with entire disregard of both the act and time of transfer. It was imposed after the death of Mrs. Keeney and was computed upon the value of the property at the time of her death, which was four years after the act of transfer. (Appraiser's Report, pp. 19-23.) And Judge Cullen, inconsistently, we submit, with his theory of the law, held that this could be done: "The liability in this case accrued at the time of transfer, *no matter when imposed.*" (Opinion, p. 33.)

The Act itself provides for the method of taxation which was followed in this case:

> "Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided, *shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof*" (Section 222).

The Act consequently does not sustain the opinion of Judge Cullen with respect to the time of the *accrual* of the tax, because it says that *the tax does not even accrue until the death of the life*

tenant. And furthermore, the law, as we have already pointed out, was enforced in this case in a way which is only explicable upon the theory that the tax accrued when the property came into the possession of the appellants, for it was at that time that it was assessed and imposed. In the face of these facts, Judge Cullen's statement that the tax accrued at the time of the transfer seems clearly wrong.

Such a tax is not a *transfer tax* at all—using "transfer" in its ordinary legal signification, as pointed out above. There is no presumption whatever that the property or its value in 1903 and in 1907 were the same. In fact, every argument of experience would show that they were in all probability very different. To pretend to tax a transfer by imposing a tax on the value of the property four years later is absurd. It is not taxing the *transfer* at all. It is taxing the *coming into possession* of the property.

To determine the taxing date of a transfer by some event other than the transfer itself, and, in particular, by an event so uncertain as the death of some person whose death bears no possible relation to the time of the transfer itself, is as unfair and ridiculous as it would be to tax transfers of stock according as whether the transferror was married or single, or according as whether his mother was dead or alive, or according to its value at the date of the death of some person. It must be perfectly apparent that the tax as imposed bears no direct relation whatever to the *transfer* alleged to be taxed.

Suppose a transfer by A to B of certain shares of stock for life of A, remainder to C. Suppose the transfer to have been made in 1890 and that

the stock was then worth $5,000. Can anything be plainer than that C acquired in 1890 the remainder interest in property worth $5,000, subject to an estate for the life of A, and that, if the transfer is to be taxed on any basis of valuation, it should be taxed on the basis of *that* value? Further, suppose that the life tenant did not die until 1910, or twenty years after the transfer, and suppose that then the stock was worth $200,000. Can it by any possible line of argument be maintained that a 5% tax upon the value at that time, namely, $10,000, is a real *transfer tax* upon a transfer which took place twenty years before and involved property worth only $5,000 at that time?

In our own cause it seems likely that there was an increase of over $50,000 during the four years between the time of the transfer made by Mrs. Keeney and her death, in the Brooklyn Eagle stock alone, and that appellants were injured, to that extent at least, by being taxed upon their coming into possession (Record, pp. 17-21).

It may be conceded that taxes may to a limited extent be imposed without regard to value. For example, a stamp tax of two cents on each check, regardless of the amount involved, or to use the example which was much relied upon by the Court of Appeals, *Ex rel. Hatch v. Riordan,* 184 N. Y. 431, a tax on stock transfers based upon the par value, regardless of the market value. But this case also recognized that there is a limit to the length to which the Legislature may go in disregarding both real and par values, and in fixing the tax by some other entirely fortuitous incident. We pointed this out on page 15, *supra,* where we contrasted that case with another stock transfer case, *Ex rel. Farrington v. Mensching,* 187 N. Y. 8, which was

declared unconstitutional.

Within these authorities and the principles therein applied, there is no warrant for holding that a tax upon transfers of property *inter-vivos* may be imposed so entirely without regard to value, as is apparently permitted in this statute.

The essence of a tax does not depend on what it is called, but on what it really is. Nothing is better settled in the law than that what is in substance one thing cannot be made out to be another by disguising it in the clothing of the other, or by giving it an assumed name. This Court will examine the substance of things and decide, according to substance, if it is different from form. As this Court said in *Mugler v. Kansas*, 123 U. S. 623, at page 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon an inquiry, whether the Legislature has transcended the limits of its authority."

The Court has held to the same effect in *Yick Wo v. Hopkins*, 118 U. S. 356; *Soon Hing v. Crowley*, 113 U. S. 703; *Neal v. Delaware*, 103 U. S. 370; *Ex parte Virginia*, 100 U. S. 339.

Applying this principle to the New York statute, it is a matter of substance and not of words what the nature of the tax provided for in this statute is. Early in its consideration of the statute, the Court of Appeals thought that the Act taxed only inheritances (*Matter of Seaman*, 147 N. Y. 69 (1895)). Later, in *Matter of Brandreth*, 169 N. Y. 437, and other cases, it abandoned this view

and frankly said that the Act taxed a certain class of transfers *inter-vivos*. In its opinion in the case at bar (pp. 31-33), it tried to justify the tax as such a tax upon transfers *inter-vivos*. We believe, for the reasons urged under Points I to IV, *supra*, that the argument of the Court upon this point fails to justify the tax considered as a tax upon a transfer *inter-vivos*, and that it is unconstitutional as such, but even if we were wrong about that, we urge upon the Court with the utmost possible emphasis, that this is not a *transfer tax* at all. It is no more a *transfer tax* in the proper sense of the term than it is an *inheritance tax*. It is different from either of them, and so far as it can be defined at all, *it is a sort of special tax upon property levied and collected upon the occasion when a remainderman comes into possesssion of property*, of which he was previously vested in remainder, where his remainder interest was preceded by an estate for the life of his grantor.

It may here be pointed out that, if the first part of our argument were not sound, and if the Legislature, contrary to that argument, can tax a transfer which creates this particular sort of remainder, it is a simple thing to change the Act in this respect, and to impose such a tax in a way to tax the transfer, provided the Legislature really feels that it must do so to protect its inheritance tax system. What we maintain under this point is, that the Legislature has not by this Act, according to its letter and as it is interpreted and enforced, taxed *the transfer* at all. An amendment of the law on those lines would merely make of the law what the Court of Appeals thought it already was. In this case, the state has done or tried to do something quite different from taxing the transfer.

VI.

A tax upon the coming into possession of property is unconstitutional because it deprives appellants of their property without due process of law and denies to them the equal protection of the laws.

Matter of Pell, 171 N. Y. 48.

If the tax in this case accrued when the property came into the possession of the appellants and was fixed upon the property according to its value at that time, it is, as we have shown, a tax upon the *coming into possession* and not upon the *transfer*. The *transfer* is, therefore, in this view, a matter of no consequence so far as the tax is concerned, and, therefore, may be disregarded entirely. If a tax upon the *coming into possession* of property is valid, then that "coming into possession" can be taxed regardless of the vesting of the legal title, although such vesting may perchance have given the grantee the right to come into possession upon the termination of some prior estate or upon the happening of some other contingency.

That the state has not the right to tax the "coming into the possession" of property irrespective of the transfer of its title rights seems to be settled, so far as New York is concerned, by the decisions of its courts. The Legislature of the State of New York once thought that it possessed such a right. By the Laws of 1899, Chapter 76,

it passed an amendment to the Tax Law, reading as follows:

> "All estates upon remainder or reversion, which vested prior to June 30th, 1885, but which will not come into actual possession or enjoyment of the person or corporation beneficially interested therein until after the passage of this Act, shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

But this provision of the law has been held unconstitutional:

Matter of Pell, 171 N. Y. 48 (1902).

The facts of this case were as follows: A testator died in 1863, leaving a life estate in all his property to his widow, with remainder to his nephews, etc. The life tenant died in December, 1899, or nine months after the above act was passed, and, consequently, the remaindermen *came into possession* and were subject to the tax within the clear language of the act. The Appellate Division decided that the act, viewed as a *transfer* or *succession tax*, was unconstitutional, but with considerable hesitation decided that it was good as a *direct tax upon property* (*Matter of Pell*, 60 N. Y. App. Div. 286). The Court of Appeals, however, unanimously decided that the act was unconstitutional, both under the state and federal constitutions and in both aspects. This case, therefore, seems to us to be a direct and controlling authority for the proposition advanced above, that the state cannot tax the mere coming into possession of property separate and apart from the vesting of the title therein.

The fundamental reason for this decision seems simple—the title having already vested under the law of the State, without the incurring of any transfer tax, the right to the possession thereof in the case of transfers *inter-vivos*, is one which the state cannot limit or destroy because the right to the possession upon the termination of the life estate passed with the vesting of the title, being an incident thereof.

We think we may safely venture to say that nowhere else is the attempt made to tax mere *coming into possession* of the property apart from the transfer of rights therein, in the case of transfers *inter-vivos*.

BUT, EVEN IF IT COULD BE CONTENDED THAT THE STATE COULD IMPOSE A TAX UPON THE COMING INTO POSSESSION OF PROPERTY GENERALLY, THE IMPOSITION OF A TAX UPON THE COMING INTO POSSESSION OF A LIMITED CLASS OF REMAINDERS WOULD BE INVALID BECAUSE SUCH CLASSIFICATION OF REMAINDERS WOULD NOT BE A REASONABLE OR JUSTIFIABLE ONE, EITHER FOR TAX PURPOSES OR FOR THE PURPOSE OF REGULATION. ALL THAT WE HAVE SAID UNDER POINTS III AND IV, SUPRA, ON THE SUBJECT OF THE POWER OF THE LEGISLATURE TO CLASSIFY, WOULD BE APPLICABLE HERE. AND UPON THE BASIS OF WHAT WE SAID UNDER THOSE POINTS, WHICH NEED NOT HERE BE REPEATED, WE CONFIDENTLY SUBMIT, THAT EVEN IF A TAX UPON THE COMING INTO POSSESSION COULD UNDER ANY CIRCUMSTANCES OR CONDITIONS BE DEFENDED, A TAX UPON THE COMING INTO POSSESSION OF A LIMITED CLASS OF REMAINDERS WOULD BE ENTIRELY UNJUSTIFIABLE.

VII.

The tax upon the coming into possession of the property in this case is also bad, because the property was situated and the coming into possession took place in the State of New Jersey, and of the three persons beneficially interested in the property, two were non-residents of the State of New York, one, Seth A. Keeney, being a resident of California, and the other, Angie Schwegel, being a resident of Austria. The State, therefore, had no jurisdiction over such property.

Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).
Matter of Pell, 171 N. Y. 48 (1902).

As already pointed out, for four years prior to Mrs. Keeney's death, the property in question had been, and at the time of her death was still located in the State of New Jersey, and in the possession of the Fidelity Trust Company, the Trustee (Record, pp. 7-8). The property passed from the State of New York in 1903, when the trust deed was executed by Mrs. Keeney, and the deed, together with the property therein mentioned, was delivered to the Fidelity Trust Company of Newark, N. J. With the execution and delivery of that deed in 1903, the possession and the entire legal interest in the property covered by the deed,

passed out of the decedent and became vested in the Trustee. The only interest in the property which the decedent retained was an equitable right to receive one-fourth of the income thereof—that is, she retained simply a right as against the Fidelity Trust Company of Newark, N. J., to enforce the obligations of the trust with respect to the payment of one-fourth of the income thereof. When Mrs. Keeney died, therefore, the only effect, so far as the rights under this trust deed are concerned, was to terminate this equitable right of hers—a mere beneficial life interest. Her death, therefore, did not have the effect of creating any right or vesting any right in her children. This right had already vested in interest, although not in possession, in her children, in 1903, under and by the terms of the trust deed itself. And, when Mrs. Keeney died, as there was no property in the State of New York over which the State of New York could exercise jurisdiction, so also no transfer of property nor other act took place at that time upon which the State of New York could base any jurisdiction. Not only was there no transfer of the property in the State of New York at that time, but also there was no coming into possession in the State of New York at that time. The coming into possession took place in the State of New Jersey, the possession of the property passing to the persons interested directly from the Trustee and not through the Estate of Mrs. Keeney.

It thus appears that this case involves an attempt by the State of New York to tax something which happened entirely outside its jurisdiction and over which it had no control. If New York State should attempt to tax the transfer of prop-

erty outside of the state because one of the parties to the transfer had by chance some other property in New York from which the tax could be collected, the unwarrantable character of the proceeding would be apparent. The unwarrantable character of the proceeding in the case at bar is no less apparent, for it was simply an attempt to tax the coming into possession of property outside of the state by seizing upon the property of one of the persons beneficially interested therein. That the State of New York cannot impose and levy a tax upon property without its limits by seizing upon other property within its limits, seems too plain for argument.

Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).

That case decided that a state could not under the Federal Constitution tax tangible personal property belonging to its residents but permanently located outside the state. It must follow from that case that the State of New York cannot tax the passing of the possession of property located outside of the state. This is particularly true in our case because only one of the three persons who came into possession of the property was even a resident of New York State.

As we have seen, the tax in this case was imposed under a section of the law which, in the main, relates to the subject of inheritance taxes, but it can derive no validity from its connection with that statute. It must stand or fall upon its own merits as a tax upon an *inter-vivos* transaction. The validity of the tax, therefore, must be determined precisely as it would have to be, if

there were a separate New York statute providing for such a tax as the State of New York has sought to collect in this case.

Let us suppose, then, that the State of New York should enact a law providing substantially as follows:

> "On and after the passage of this Act, all property passing by transfer from a resident of this state to a resident of any other state, in trust, in whole or in part, for the residents of other states, subject to a life interest in the grantor, shall be subject to a tax upon the coming into possession by such remaindermen of said property. Said tax shall accrue and be assessed as of the time when said property comes into possession, and shall accrue and be assessed upon all property, whether situated within or without the state. In case the persons into whose possession the property shall come as remaindermen, shall be related collaterally to the grantor, the tax shall be 5%, and in case they are lineal descendants the tax shall be 1%."

Such provisions as these, embodied in a separate statute limited to the taxation of transfers *inter-viros*, would be plainly invalid. They are none the less invalid, because they are hidden in the recesses of a statute dealing with the taxation of transfers by will or intestacy, but because they are so hidden, the fact of their invalidity more easily escapes detection—indeed, uncertainty and confusion necessarily result whenever two entirely distinct and incongruous things are covered by the same statute.

If the Legislature had undertaken to frame a separate and distinct statute for the taxation of transfers *inter-viros*, it would have been seen at

once that the discrimination between different classes of grantees, imposing 1% on some of them and 5% on others, would be invalid, although such a discrimination is perfectly valid in the case of testamentary transfers.

Matter of Pell, 171 N. Y. 48, *supra.*

In this case, at p. 60, the learned Court referring to a section of the law under which the tax herein was imposed, stated:

> "This amendment is clearly unconstitutional in another aspect, as it does not apportion the burden equally among the owners of the estate sought to be taxed, for it imposes on some 5%, on others 1%, and as to other owners nothing at all. It is true this discrimination was brought about because the Legislature was dealing with a succession tax and, consequently, maintained the different rates of taxation found in the Act in relation to taxable transfers. This is still further evidence that the intention of the Legislature was not to exercise its powers of direct taxation."

It would also have been seen that a tax upon the *coming into possession* of vested remainders would be invalid.

Matter of Pell, 171 N. Y. 48, *supra.*

At page 59 the learned Court says:

> "The vice of this legislation is that it does not seek to impose a tax upon all estates upon remainder, whether created by will or deed, that vested prior to June 30th, 1885, but con-

tains the further provision that the life estate must expire after the passage of the amendment on March 14th, 1889."

Again the Court states on page 59:

"* * * Where the statute declares that the owners of a particular class of property, *acquired at a particular time*, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification."

The same thing would be true of a statute declaring that owners of a particular class of property, *acquired in a particular way*, shall be taxed.

In like manner, it would have been seen that a tax upon a transfer of property could not be imposed and assessed upon the coming into possession of property transferred years before.

Finally, it would have been seen that a tax imposed in the matter of the settlement of a decedent's estate upon property which is not only no part of that estate, having ceased to be a part of it four years before, but is located and comes into possession in another state and two-thirds of which passed to non-residents of New York would be beyond the constitutional power of the Legislature. This is what in fact has been attempted in this case.

ALL THAT IS REQUIRED, THEREFORE, FOR A REVERSAL OF THE JUDGMENT HEREIN, IS FOR THIS COURT TO HOLD THAT THE STATE OF NEW YORK CANNOT IN A TRANSFER TAX PROCEEDING IN THE MATTER OF A DECEDENT'S ESTATE, TAX PROPERTY WHICH DOES NOT BELONG TO THAT ESTATE, WHICH AT THE TIME OF DECEDENT'S DEATH AND FOR YEARS

PRIOR THERETO, WAS NOT LOCATED IN THE STATE OF NEW YORK, BUT WAS LOCATED IN THE STATE OF NEW JERSEY, AND IN WHICH THE BENEFICIAL INTEREST AND RIGHT TO POSSESSION WAS ALREADY VESTED AS TO TWO-THIRDS OF IT, IN NON-RESIDENTS OF THE STATE OF NEW YORK.

It thus appears that the reversal of this decree requires that the statutory provisions complained of should be declared unconstitutional only to a limited extent, namely, they should be declared unconstitutional only so far as necessary to prevent the perpetration of this transparent act of spoliation.

The Court of Appeals has already in effect declared the statutory provisions in question unconstitutional in part (see Matter of Pell, *supra*), and some amendment of these provisions is therefore necessary in any event.

In conclusion, we may be permitted to point out that, even if it were necessary for the purposes of this case for the Court to declare these statutory provisions wholly unconstitutional, such a decision would not, as already shown, injuriously affect the system of inheritance taxes in force in New York and many other states. It would not deprive any state of any legitimate source of revenue. It would not deprive any state of any substantial amount of revenue already collected or in process of collectoin. But as already stated, the Court need not go so far as to declare the provisions wholly unconstitutional. This case, therefore, presents a situation in which the Court need not hesitate to protect individual rights as against the claims of a state—the situation, namely, in which it appears that a right of property has been substantially impaired without any substantial

benefit to the public welfare, and that the way is open to the Court to protect the violated individual right without injury to the public interests simply by declaring a statute unconstitutional in so far as it involves a violation of such individual right without benefit to the public.

VIII.

The order of the Surrogate's Court of the County of Kings, State of New York, entered upon the remittitur of the Court of Appeals, and affirming the order of the said Surrogate's Court imposing the tax in question, should be reversed with costs to the appellants in all courts.

Respectfully submitted,

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No. 81.

Supreme Court of the United States

OCTOBER TERM—1911.

FRED C. KEENEY, Individually and as Administrator of the Estate of Susan A. Keeney, deceased; SETH A. KEENEY and ANGIE KEENEY SCHWEGEL, Plaintiffs-in-Error,

vs.

THE COMPTROLLER OF THE STATE OF NEW YORK, Defendant in Error.

Office Supreme Court, U. S.
FILED.
DEC 2 1911
JAMES H. McKENNEY,
CLERK

In error to the Surrogate's Court of the County of Kings, State of New York.

BRIEF FOR COMPTROLLER OF THE STATE OF NEW YORK—DEFENDANT IN ERROR.

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Supreme Court of the United States

OCTOBER TERM—1911.

FRED C. KEENEY, Individually and as Administrator of the Estate of Susan A. Keeney, deceased; SETH A. KEENEY and ANGIE KEENEY SCHWEGEL, Plaintiffs-in-Error,

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THE COMPTROLLER OF THE STATE OF NEW YORK, Defendant in Error.

In error to the Surrogate's Court of the County of Kings, State of New York.

BRIEF FOR COMPTROLLER OF THE STATE OF NEW YORK---DEFENDANT IN ERROR.

This is a writ of error to the Surrogate's Court of Kings County, of the State of New York, but its real purpose is to review a decision of the Court of Appeals of the State of New York (*Matter of Keeney*, 194 N. Y., 281), sustaining an order of the Surrogate's Court of Kings County, which imposed a transfer tax upon the right of the plaintiffs-in-error to the succession of certain remainders in one-fourth share of a trust estate created by Susan A. Keeney, deceased, during her lifetime. The remainders in said one-quarter share of the trust estate were limited by said trust deed to vest in possession and enjoyment at her death (the donor and former owner of the property), the use and enjoyment of the entire income

of said one-quarter share having been reserved to herself for life.

The plaintiffs-in-error have prosecuted this appeal to the Supreme Court of the United States, and invoke the protection of the Constitution of the United States, to wit: Article I, Section 10 thereof, and Article XIV, Section 2 thereof, assigning as error:

> "That in the record and proceedings in this cause and in the final order and judgment made and entered herein on the 3rd day of April, 1909, by the Surrogate's Court of the State of New York for the County of Kings, on a remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:
>
> I. Error in declining to hold that the Act of the Legislature of the State of New York, approved May 27th, 1893 (Chapter 908, Section 220, subdivision 3, of the Laws of 1896), entitled an 'Act in relation to Taxation, Constituting Chapter 24 of the General Laws' as amended by the Act of the Legislature of the State of New York, approved April 16th, 1897 (Chapter 284, Section 2, of the Laws of 1897), entitled 'An Act to Amend Certain Sections of Article X of Chapter 908 of the Laws of 1896, entitled, "An Act in Relation to Taxation Constituting Chapter 24 of the General Laws Relating to Taxable Transfers of Property" insofar as it and its amendments and re-enactments authorize the assessment imposed by the Surrogate of the County of Kings, in the State of New York by an order dated September 24th, 1907, upon a transfer of certain property belonging to Susan A. Keeney, now the decedent herein, and transferred to the appellants herein by a certain trust deed in said order referred to, deprives the petitioners, the appellants herein, of their property, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

II. Error in declining to hold that such legislative enactment, insofar as it authorizes the said assessment, denies to said appellants the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States."

The facts are undisputed, that Susan A. Keeney, deceased, was a resident of Kings County, in the State of New York, at the time of the execution of the trust deed in question, and at the time of her death. The decedent, in 1903, created a trust fund of personal property, naming The Fidelity Trust Company of Newark, New Jersey, trustee thereof, and vesting title to the trust estate in said trustee, designating *four equal shares* therein. The income of three shares was directed to be paid to three of her children for their lives with certain provisions for the disposition of their three shares of the trust estate upon their deaths.

In one share of said trust estate, the testatrix reserved the use and enjoyment of the income to herself (the former owner and creator of the estate) for life, and directed that upon her death remainders in said share should vest in possession and enjoyment in her children then living or their issue.

The Surrogate of Kings County imposed no tax upon the succession of the remainders created in three-fourths of the trust estate, and reference is made to them only to emphasize the distinction taken by the statute in question and the interpretation and construction which the Court of Appeals of the State of New York has placed upon the successions in the said one-fourth share of the trust estate, and the application of the statute in question to the remainders created in said share. This one-fourth share was limited to vest in possession and enjoyment at the death of the former owner of the property, the creator of the trust.

It must be conceded, that the determination of the Surrogate's Court of Kings County, that the remainders created in three-fourths of the trust estate were exempt from the imposition of the tax, and that the statute did not apply to them, and that the remainders created in the remaining one-fourth of the trust estate were subject to the imposition of a

tax, in each case, was a matter of construction and interpretation upon questions solely of State cognizance and jurisprudence. Such construction and interpretation, with reference to this statute, involved the construction and interpretation of the deed of trust, the statute in question, the statutes of the State regarding the transfer of property and the recognized principles of law applicable thereto. And we contend that as to the Supreme Court of the United States, to whom this appeal has come, such determination and construction are final—are matters purely of local cognizance and judicial interpretation.

That this Court will look to the statutes of the State as to the descent and testamentary transfer, alienation and succession of property, and will not only adopt but is bound by, the decisions of the highest courts of the State, as to the construction and interpretation of instruments of title and the application of the statutes to them, has been repeatedly expressed by this Court.

This Court in *Gulf and Ship Island Railway Company* v. *Hewes*, 183 U. S., 66-75-76:

> "This Court has repeatedly held that we cannot revise a judgment of the highest Court of a State unless by its terms or necessary operation it gives effect to some provision of a State constitution or law which as thus construed, impairs the obligation of a precedent contract. In *Railroad Co.* v. *Rock*, 4 Wall, 177, 181, this court pronounced as a fundamental error, that this court cannot as an appellate tribunal reverse the judgment of a State court because that court may hold a contract to be void, which this court may hold to be valid. So, too, in *Knox* v. *Exchange Bank*, 12 Wall, 379-383, it was said by Mr. Justice MILLER, 'But we are not authorized by this judiciary act to review the judgments of the State courts because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligation of contracts, if we did, every case decided in

> the State courts could be brought here when the parties setting up a contract alleged that the court has taken a different view of its obligations to that which we held.' To the same effect are *Lehigh Water Co.* v. *Louisiana Sugar Co.*, 125 U. S., 18-30. In the latter case it is said by Mr. Justice GRAY, 'In order to come within the provisions of the constitution of the United States, which declare that, "No State shall pass any law impairing the obligation of contracts," not only must the obligations of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State and not at the decisions of its courts, the acts of administrative or executive boards or officers or the doings of corporations or individuals' (see *Central Land Co.* v. *Laidley*, 159 U. S., 103-109)."

We contend that here, if ever, arose a question peculiarly within the jurisdiction of the State courts as to the vesting of the remainders in question with reference to the statute: that the determination as to the time and conditions of their vesting and the application of the statute thereto, were matters purely of State cognizance.

The determination of all questions which were necessary to be passed upon, in order that the Court of Appeals might render its final decision, has been finally adjudicated upon by the highest Court of the State of New York, and raises no question for this Court to determine.

In *De Vaughn* v. *Hutchinson*, 165 U. S., 566, a decision much quoted by this Court, it was said,

> "It is a principle firmly established, that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances."

So that when the decision in this case is presented to this Court, this Court will not only adopt, but is bound by such decision, that there is nothing in the statute as applied to the particular facts in question which violates the rights of the plaintiffs in error under the constitution of the State.

Such decision is a final adjudication as far as the State procedure is concerned, not only as to the constitutionality of the statute, but as to all matters of State procedure and jurisprudence by which this determination was arrived at and made final in its judgment.

Although this tax is under a different sub-division of the Transfer Tax Law of the State of New York than was applicable to the imposition of the tax reviewed in *Orr* v. *Gilman*, 183 U. S., 278-282, the general provisions of the statute, in such decision, were held not to be in violation of the Fourteenth Amendment, nor of Article 1, section 10, of the Constitution of the United States. In which decision, this Court said:

> "We here meet in the first place the question of construction of the will of....., under by virtue of that will, did the property whose transfer is taxed, pass to and become vested in the grandchildren, or did the property not become vested in them until and by virtue of that will of ....., exercising the power of appointment? The answer to be given to this question must of course be that furnished us by the Court of Appeals in this case" (page 282) and continuing,
>
> "While it is settled law that this Court will follow the construction put by the State courts upon wills devising property situated within its State, and while it is also true that we adopt the construction of its own statutes by the State courts, a question may arise whether the statute as so construed imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States. This

> Court has no authority to revise the statutes of New York upon any ground of justice, policy or consistency to its own constitution. Such questions are concluded by the decisions of the legislature and judicial authorities of the State."

In the same decision, there was quoted a portion of the opinion in *Carpenter* v. *Pennsylvania,* 17 Howard, 456, as pertinent upon the same point:

> "It is in some cases, true that rights of the donees under a will are vested at the death of the testator and that the acts of administration which follow are conservatory means, directed by the State, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty, and the legislation adopted with any other aim than this would justify criticism and perhaps censure, *but until the period for distribution arrives,* the law of the decedent's domicile attaches to the property and all other jurisdiction refer to the place of the *domicil as that when the distribution should be made;*"

and referring to the particular decision of the Court of Appeals (*In re Delano,* 176 N. Y., 486), that it was the exercise of the power of appointment which subjected the grantees under it to the tax, said,

> "This conclusion is binding upon this Court insofar as it involves a construction of the will and of the statute."

When this appeal came before the Court of Appeals of the State of New York, counsel for the plaintiffs in error conceded that according to certain recognized decisions of the Court of Appeals of the State of New York (citing *Matter of Green,* 153 N. Y., 223-228; *Matter of Brandreth,* 169 N. Y., 137; *Matter of Cornell,* 170 N. Y., 423), that the remainders created in one-fourth of said trust estate were subject to the

imposition of the tax and within the purpose and intendment of the statute applicable to the same, but raised the constitutional questions that such statute was unconstitutional upon the ground that it was in contravention of the Fourteenth Amendment of the United States Constitution and against Article 1, Section 10 thereof, in that it impairs the obligation of contracts.

Objections were made that the statute was unconstitutional, as involving an "arbitrary, discriminatory and unequal tax upon the transfer of property, first, the rate of tax varies according to the relation the grantee bears to the grantor and, second, it singles out for taxation, transfers where a life interest is reserved to the grantor, leaving all other transfers or conveyances exempt."

The Court of Appeals of the State of New York (citing *Beers* v. *Glynn*, 211 U. S., 577), held that the first objection was covered by the above decision on the ground that the plaintiffs in error are of a class subject to the lowest rate of taxation and could not raise the question inasmuch as it did not affect them. The second objection is covered by the decision of the Court, quoted herein at page 9 of this brief.

When the case of *Chanler* v. *Kelsey* (205 U. S., 466), came before this Court, the plaintiffs in error therein contended that inasmuch as the remainders which had been created under a power of appointment given by deed, which deed had been executed prior to the enactment of the statute imposing the tax, that the power of appointment did not create any testamentary succession to which the statute could be applied, but that the power of appointment related back to the deed and was part of it, and that the remainders created by the power of appointment related back to the original deed

It was urged at length that the remainders so appointed were not made in contemplation of death, but arose out of and under the deed executed before there was any succession tax in New York State; that the right to exercise that power

of appointment in full *was a contract right which had its existence defined in said deed not depending upon any privilege granted by the State*, and that the Court of Appeals of the State of New York had erred in refusing to hold that the amendment of the statute was unconstitutional and void, as being repugnant to Section 10, Article 1, of the Constitution of the United States in that it impaired the obligation of a contract made prior to the enactment of the statute. This Court in answer to said argument (*Chanler* v. *Kelsey*, 205 U. S., 466, at page 473), declared:

> "The validity of this tax was attacked in the courts of New York upon objections pertaining to both Federal and State constitutions. The latter are not open here, and we shall consider the case only so far as it relates to the objections of the Federal Constitution."
>
> (Page 478.) "As in *Orr* v. *Gilman*, 183 U. S., *supra*, we must accept this decision of the New York Court of Appeals holding, that it is the exercise of the power which is the essential thing to transfer the estate under which the tax is imposed."
>
> (Page 478.) "We cannot say that property has been taken without due process of law within the protection of the Fourteenth Amendment by the manner in which the Court of Appeals has construed and enforced this statute. (*Orr* v. *Gilman*, 183 U. S., *supra*.) Nor do we perceive that the effect has been to violate any contract right of the parties."

In the case before this Court the facts are undisputed, that a succession as designated by the statute, to wit: *the vesting in possession and enjoyment of the remainders at or after the death of the grantor, was caused by the death of the* FORMER OWNER *of the property taken*, while in the Chanler case, it is true that the succession in question was not caused by the death of the former owner, as quoted in the *Knowlton* v. *Moore* case, 178 U. S., 41, at p. 56, and *Cahen* v. *Brewster*, 203 U. S., 543, at p. 550, but by the exercise of the power of appointment.

> "Death is the generating source from which the particular taxing power takes its being."

This makes the position of the defendant in error herein doubly fortified by the Chanler case, for it was the death of the *former owner* which vested the possession and enjoyment of the estate in the remainders, and so limited by the deed of trust.

It is undisputed that the courts of the State of New York have treated this tax, as one upon a testamentary succession and upheld it as an exercise by the State of its power over the disposition of property of deceased persons. This brings us to the point, as to whether or not the State has the power to make a class of remainders created by gift, grant or deed, which are therein limited to vest in possession and enjoyment at the death of the grantor, donor or vendor, subject to the imposition of a testamentary succession tax.

That there was a succession in possession and enjoyment and that the statute applied are both decided by the decision of the Court of Appeals in the case now under review.

The section of the statute under review and its construction by the Courts of the State of New York.

Section 220 of the Transfer Tax Law of the State of New York which is before this Court for review as to whether it is in contravention to the Constitutional rights of the appellants is as follows:

> "A tax shall be, and is hereby, imposed upon the transfer of property, real or personal, of the value of $500, or over, or of any interest therein, or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases:
>
> "Subdivision 4. When the transfer is of property made by a resident or a non-resident, when such non-

resident's property is within the State, by deed, grant, bargain, sale or gift made in contemplation of the death of the *grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death.*"

The words "intended to take effect in possession or enjoyment at or after such death" were first placed in Section 1 of the original Act of 1885.

The words "made in contemplation of death of the grantor, vendor, or donor" were first placed in the statute by Chapter 215 of Laws of 1891. Both of which provisions have been embodied in the successive Acts.

The enactment of these provisions was rendered necessary by the numerous deeds of trust, which, while providing for a disposal of the estate of the grantor, vendor or donor, at his death, reserved to himself for life, the beneficial use, possession or enjoyment. These deeds of trust were testamentary in nature and effect, in that they generally provided for the disposition of the property to the same persons who would be the natural objects of the donor's bounty, in a truly testamentary disposition of property.

With this statute in mind, various ingenious schemes to avoid the imposition of the transfer tax have appeared; in many the testator was not quite satisfied to give up all control, and reserved to himself the power of revocation, in addition to the reservation of the income for life.

In some of the trust deeds which have come to the attention of the courts of the State of New York, the legal title was transferred, but the beneficial possession or enjoyment was expressly reserved, or contained in agreements simultaneously made. In many, such agreements were oral, but sufficient to satisfy the donor, as *the technical transfers* were to the natural objects of his bounty, and he was willing to rely upon same.

The appellants here have in effect argued that this statute as construed by the highest Court of the State of New York,

has arbitrarily declared this particular remainder to be a testamentary disposition of property, whereas it is a gift *inter vivos* complete in all respects at the date of the execution of the instrument transferring the property to the trustee, and that the imposition of the tax upon such a remainder effects a confiscation of property by diminution to the extent of the tax.

By reference to the statute it will be seen that the statute contemplates taxing the transferring of property by deed, grant, bargain, sale or gift made in contemplation of death of the grantor, vendor, or donor, *or intended to take effect in possession or enjoyment at or after such death.*

The Courts of the State of New York before whom this particular remainder came for review, have at all times had jurisdiction and authority to determine whether or not a gift claiming to be a gift *inter vivos* was in reality a gift *causa mortis.* Such determination involved an examination into the legal effect of the alleged gift, in the same manner as the Court would examine into an alleged gift *inter vivos.*

When an alleged gift *inter vivos* is found to be a gift *causa mortis,* it comes within the portion of the section 220 of the Tax Law of the State of New York, which provides: That transfers made in contemplation of death shall be taxable as testamentary transfers. The various courts of the State of New York have never arbitrarily construed the creation of a remainder as coming within this particular section of the Tax Law, so that when the *Matter of Keeney* as construed by the highest Court of the State of New York comes before this Court for review, the question as to the sufficiency of findings of fact and the construction of the statute in question as applicable thereto, have been fully determined. The appellants here have not been barred of any right, upon the review by the Court of Appeals of the sufficiency of the findings of fact and the determination of the various Courts as to the application of the statute.

THE BASIS FOR THE CLASSIFICATION OF THIS PARTICULAR REMAINDER AND ITS TAXABILITY IS THAT IT IS THE ONLY CLASS IN WHICH—

"THE USUAL ABSOLUTENESS OF RIGHT AND ENJOYMENT WHICH A COMPLETED GIFT CARRIES IS WANTING."

And this is the test that the Courts of the State of New York have applied to each gift in determining whether the statute was applicable thereto.

In such remainders the legal title may pass to the trustees, but it is the intention of the grantor, vendor or donor to make the possession and enjoyment thereof take effect at or after such death, which brings it within this provision of the statute.

In the case before this Court the trust deed spoke for itself, and the language of same justified the findings of the Court of Appeals in holding that one-fourth of the corpus of the trust property was subject to the imposition of the tax.

Decisions as to the Application of the Statute.

The following cases contain expressions of the Courts of New York as to the application of the statute to remainders similar to the one at bar, and are set forth so that this Court may see that the Courts have not arbitrarily declared that a gift *inter vivos* shall be a gift *causa mortis*, or a gift intended to take effect in possession or enjoyment at or after the death of the grantor, vendor or donor.

In the *Matter of Brandreth*, 169 N. Y., 437, the testator made a transfer of stock to his four daughters, who on the same day, made, executed, acknowledged and delivered to him an instrument which recited that Brandreth had transferred the stock "upon condition that he is to receive all dividends declared upon the stock for the term of his life, and also upon condition that he has a right to vote upon the stock the same as if no transfer had been made. This agreement was not to be revocable by any or all of them but to continue

in force until the death of said Brandreth." The Court said (page 440):

> "The effect of these instruments was to transfer to the daughters the remainders in the stock 'after the donor's death' reserving to the latter an estate for life."

Page 441:

> "It is not necessary that the transfer should be made in contemplation of death, the liability to taxation depends solely upon the character of the interest or estate transferred."

Page 442:

> "Though a remainder may vest in title at its creation, it cannot vest in possession until the determination of the prior estate. It makes no difference in this respect whether the remainder is vested indefeasibly or is contingent or subject to be divested" (Citing *Matter of Green*, 153 N. Y., 223-227).

In *Matter of Skinner*, 106 App. Div., 217, the testator had deeded land to another for use of grantor during his life, and at his death to become the property of the grantee. There was also a collateral agreement that the grantor might at any time have the use of any portion of the property, and the grantee covenanted to execute any instrument to carry into effect such understanding. The transfer thereof was held taxable under the section applicable herein.

In the *Matter of Cruger*, 54 App. Div., 405, the testator executed a trust deed transferring personal property to a trustee, in trust, to invest the principal and out of the net income to pay *during his life* to his daughter, her executors, administrators, the sum of twelve hundred dollars annually, and to return any balance of said income to him, and at his death to pay over the trust fund and any accumulated income to Angela Cruger, if living, or if she be dead, to her issue, or in default of same, to such persons as she should by

will appoint, or in default of such a person, to such persons as will be entitled to the same under the Laws of the State of New York, had she died intestate. *It was held that the contingent remainders given to the next of kin of Angela Cruger could not take effect in possession or enjoyment until the death of the creator of the trust.* The case as to them fell within the provisions of the transfer tax law applicable herein. The Court said:

> "If there were no authority we should think that the plain reading of the statute brought this case within its terms and made the estate subject to the tax. Such, also, seemed to have been the view entertained by the Court of Appeals (*Matter of Green*, 153 N. Y., 223). It was there held that the real question was not whether the remainders vested at the time of the creation of the trust as in the present claim of the respondent, but whether the remainders were intended to 'take effect in possession or enjoyment, at or after the death of the donor.' In the present case as in that case, although the remainders must be held to have vested, yet the remainder could not have had actual possession or enjoyment, or right of possession until after the death of the founder of the trust."

In *Matter of Green*, 153 N. Y., 223, there was a delivery of bonds to a trustee to collect the income and apply the same to the donor's use during her life, after her death to divide and pay over the same and the proceeds among her three nieces, who were named, the issue of any who might die before the donor to receive the share to which the mother would be entitled if living, and in case of the death of the nieces before her without issue her share to go to the survivors.

Upon the death of the donor the property passed into the possession of the nieces under terms of deed. Mr. Justice O'BRIEN, writing the decision, says:

"It is not very important to determine whether the trust instruments were made in contemplation of death, or whether upon the delivery thereof, the remainder vested in the nieces in such a sense as to constitute a gift *inter vivos* within the meaning of the cases cited by the learned counsel for respondent. It may be conceded that upon the delivery of the trust deed an interest in remainder vested in the nieces subject to open and let in the children of one who had died during the lifetime of the donor according to the terms of the instrument."

"The real question is whether the remainders which the nieces took under the deed were intended to 'take effect in possession and enjoyment' at or after the death of the donor."

"Until her death, they had no actual possession or right to the possession of the property. *Since they would not receive any part of the principal or the income till after her death, their right of enjoyment was postponed till the happening of that event.* Whatever interest they may have had before, the right to the possession and enjoyment depended upon the death of the donor."

And again at page 228:

"The death of the donor was the event which made the transfer complete and effective and secured to the nieces the possession and enjoyment of the property."

In *Matter of Cornell*, 170 N. Y., 423, the testator made a gift of securities under an agreement that the donor should have, during his life, "all or such part of the net income thereof as he might wish" the donee to have the possession and management of the securities, it was held that such gift does not make the donee the absolute owner thereof, but the holder thereof in trust, until the death of the donor, to pay the income thereof to the donor. Such gift was held taxable as a transfer to take effect after the death of the donor.

The Court, in referring to the transfers of the various gifts, said:

> "Though possession of the securities was given to the donee, this did not make him their absolute owner. It was necessary to deliver the securities to the donee, for without delivery there could be no valid gift. By such delivery the donee did not become the absolute owner of the securities transferred to him, but as the donor reserved a life interest the donee during the donor's life held the securities in trust to pay the income to the donor. Had the donee died before the donor, or became insolvent the securities would not have passed to his estate or to his creditors, but only a remainder in them after death of the donor. The agreement was not to support the donor nor to pay him a specified sum nor an amount equal the income or interest realized by the securities, but to pay that income and interest as such."

In *Matter of Palmer*, 117 A. D., 360, Mr. Justice COCHRANE, concurring in the decision of the Court, in his opinion, said:

> "I do not think, however, that it is necessary to hold that the transfer in question was made 'in contemplation of death' within the meaning of the tax law. But it is quite clear to me that under the instrument of January 10, 1905, Rufus K. Palmer, the son of the decedent, took no title to the property therein mentioned. The transaction in form was sufficient to constitute a gift *inter vivos. But the law penetrates beneath the surface of a transaction and considers not its form but its purpose.*"
>
> "Finally the respondents contend that the burden of proof is with the Comptroller to show that the gift was made in contemplation of death and that the only positive evidence is to the contrary; *to prove the same*

> *must of necessity be circumstantial rather than direct, and such circumstantial evidence may overbear the positive testimony of an interested party, who swears to the contrary."*

In *Matter of Keeney,* 194 N. Y., 281, now under review, commenting upon the reasons for the enactment of the statute, the Court of Appeals declared:

> "A not wholly unnatural desire exists among owners of property to avoid the imposition of inheritance taxes upon the estates they may leave, so that such estates may pass to the objects of their bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life. Were it not for the provision of the statute, which is challenged, it is clear that in many cases the estate on the death of a grantor would pass free from tax TO THE SAME PERSONS WHO WOULD TAKE IT HAD THE GRANTOR MADE A WILL OR DIED INTESTATE."

It will be seen therefore that the courts of the State of New York penetrate beneath the surface of an instrument purporting to convey a gift *inter vivos,* to find the "INTENT" of the grantor, vendor or donor. It cannot be denied that there was a succession caused by the death of the grantor, the former owner of the property. It may be couched in either of the following terms:

> Either "That the remainders were intended to vest and did vest in possession and enjoyment at or after her death," or
>
> "That there was a cessation of claim upon that portion of the corpus, which the grantor intended should be effected by and take effect only at her death."

No matter which words may more aptly phrase the succession, intended to take effect at her death, a succession then took place.

Furthermore, independent considerations, other than the rights of the plaintiffs in error under the Constitution of the United States were necessarily involved in the determination of the State Court herein. In every other case (referred to by the appellants) new and independent facts and circumstances will arise, but they must stand the test of the statute. The decision of the Court of Appeals, which became the judgment of the Surrogate's Court upon the entry of its order and remittitur, involved, upon all points necessary to be determined, only questions of local law and the jurisprudence of the State of New York. Such determination included all questions as to the *situs* of property, and the right of the State of New York to apply the tax to the transfer of and the successions in the one-fourth of the corpus of the trust.

The Supreme Court of the United States has declared in *Smiley* v. *Kansas*, 196 U. S., 447-455, and in *Armour Packing Co.* v. *Lacy*, 200 U. S., 226, that such construction by the State Court is binding upon this Court, although it might place a different construction upon the matters involved.

This Court has repeatedly declared that a Writ of Error from this Court to the State Court cannot be sustained where the decision rests on INDEPENDENT GROUNDS AND NOT ONLY against a right claimed under the Constitution of the United States, and that in such cases it will dismiss the Writ.

McMillan v. *Ferrum Min. Co.*, 197 U. S., 343.
Rutland R. R. Co. v. *Central Vermont R. R. Co.*, 159 U. S., 638.
Eustis v. *Bolles*, 150 U. S., 366.
Cal. Powder Co. v. *Davis*, 151 U. S., 393.
Giles v. *Teasley*, 193 U. S., 160.
Sawyer v. *Piper*, 189 U. S., 156.
Moffitt v. *Kelly*, 218 U. S., 400

The Graduations in the Inheritance Tax.

Laws imposing a tax upon inheritances have existed in the United States since 1826.

There is no doubt that the idea of a graduated progressive tax, graduated not only according to relationship, but also as to the amount of the estate or the amount coming to the recipient, has become firmly established beyond the reach of criticism.

Switzerland, Great Britain, Australia and Canada have recognized the principles of such graduations, and have embodied them in their respective Inheritance Tax Laws.

The economic history of the Tax is set forth lucidly in *Knowlton* v. *Moore* and in *Cahen* v. *Brewster*.

The principles of graduation by relationship are universally recognized; those based on the amount of the estate or the amount coming to the recipient are recognized in this country and the aforesaid countries. Wherever this tax exists, there has never been any criticism upon the rights of the State to enact such graduations as might be necessary to produce the required revenue. For as the State has the sovereign right to impose this tax, and as a necessary element thereof, the right to classify, there can be no universal rule for graduations either as to relationship, or for graduations of the amount of the estate or share coming to the recipient, which will determine an act constitutional or unconstitutional.

Nor are the arguments, which have been frequently urged against the idea of graduation based upon the amount of the estate as against the amount coming to the individual recipient, convincing upon the "profound inequality" referred to in *Knowlton* v. *Moore*, 178 U. S., 41, one of the tests to be applied.

On the contrary the most enlightened ideas upon such graduations come back to the theory for the graduation, the necessity of the State to raise revenue, and the right to demand that the greater the fortune the greater percentage thereof should be contributed to the State for such purpose.

POINT I.

The enactment of rules, regulations and principles governing the transmission of property by will, intestacy or other coveyances testamentary in character and effect are within the exclusive province of the State. The Supreme Court of the United States will look to the statutes of the State for the rules governing the descent and testamentary transfer, alienation and succession of property. This Court will not only adopt but is bound by the decisions of the highest courts of the States as to the effect and interpretation of wills and instruments of title.

Orr v. *Gilman*, 183 U. S., 278-283-290.
De Vaughn v. *Hutchinson*, 165 U. S., 566-570.
Clarke v. *Clarke*, 178 U. S., 186-190.
Magoun v. *Illinois Trust Co.*, 170 U. S., 283.
Yazoo & Miss. Valley R'd. v. *Adams*, 181 U. S., 580-583.
Eastern B. & L. Assn. v. *Ebaugh*, 185 U. S., 114-132.
Louisville & Nash. R. R. Co. v. *Melton*, 218 U. S., 36.
Leffingwell v. *Warren*, 2 Black, 599-603.
Randall v. *Brigham*, 7 Wall, 523-541.
Morley v. *Lake Shore R. R. Co.*, 146 U. S., 162-163-167.
Moffitt v. *Kelly*, 218 U. S., 400-405.

POINT II.

A. This Court will also be bound by the decision of the highest court of the State that there is nothing in the statute or its enforcement in conflict with the Constitution of the State, and that the proceedings taken therein for its ascertainment did not deprive the plaintiffs in error of their property without due process of law within the meaning of the State Constitution.

People ex. Met. St. R'way Co. v. *N. Y. State Board of Tax Commrs.*, 199 U. S., 1-47.
Orr v. *Gilman*, 183 U. S., 278-283.
Carpenter v. *Pennsylvania*, 17 How., 452.
Wallace v. *Myers*, 38 Fed. Rep., 184.

B. In *Yazoo* v. *Miss. Valley R R. Co.*, 181 U. S., 580-583, upon the interpretation and construction of the highest court of the State, it was declared:

> "Assuming that we may exercise an independent judgment respecting the construction * * * the right asserted depends upon comparison and construction of such statute and the settled rule of this Court, is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of the construction of the State statute which has been adopted by the Court of last resort of the State."

That the constitutionality of the statute has been passed upon by the State Court, we refer to the decision (*In re Keeney*, 194 N. Y., 281), wherein the Court of Appeals, the Court of last resort of that State, said:

> "As to the second objection, that the statute taxes transfers only of one character, excepting others, we do not think the discrimination is so unreasonable that the statute can be pronounced invalid. The right

and power of governments to single out certain classes of objects, leaving other classes exempt or taxed at different rates, or in a different manner is unquestionable" (Citing *Beers* v. *Glynn*, 211 U. S., 477).

POINT III.

It is well settled that the interpretation and construction placed by the highest court of the State upon its statutes is conclusive upon this Court.

Smiley v. *Kansas*, 196 U. S., 447.
Hibben v. *Smith*, 191 U. S., 310.
Blackstone v. *Miller*, 188 U. S., 189-207.
Watson v. *Maryland*, 218 U. S., 173-175.
Kentucky Union Co. v. *Com. of Kentucky*, 219 U. S., 140-151.
Tilt v. *Kelsey*, 207 U. S., 43-56.
Lindsley v. *Natural Car. Gas Co.*, 220 U. S., 61.

Thus the application of the statute to the remainders which vested in possession and enjoyment at the death of the donor, the former owner, as determined by the decision of the Court of Appeals (*Matter of Keeney*, 194 N. Y., 281) bind this Court *upon all questions to be therein determined.*

In *Eastern Bld. Loan Assn.* v. *Ebaugh*, 185 U. S., 114-122, it was said:

> "A necessary element in both propositions(if they may be regarded as independent) is the law of New York and in the latter is involved not only what the statutory law is, but what its application is under the decision of the Courts of that State. Both, as we have seen, were facts to be found, *and the finding upon which is binding upon us.*"

In *Moffitt* v. *Kelly*, 218 U. S., 400-405, this Court, taking up the decision of the highest Court of the State of California as to the time of vesting of a wife's rights in community property, and the application of the statute, said:

> "This would be the case, because as there was State power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely State question not involving any violation of the Constitution of the United States, which therefore we have no right to review."

And answering the claims of the plaintiff in error of right to review the determination of the State Court, said:

> "But this merely rests upon the mistaken conception previously disposed of, since the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question, which we have no right to review."

Therefore the decision of the Court of Appeals, that the vesting in possession and enjoyment of the remainders at the death of the grantor was a testamentary succession, that it was subject to the imposition of the tax, and that there is nothing in the statute or its enforcement in violation of the State Constitution, is binding upon this Court.

The following cases contain expressions of this Court, in which the exclusive right of the State Courts to construe and interpret instruments of title is recognized.

In *Chanler* v. *Kelsey*, 205 U. S., 477, was declared:

> "In other words, the Court of Appeals of New York had the exclusive right to construe instruments of title in that State, and determine for itself the creation

and vesting of estates through wills under the laws of the State."

In *Cahen* v. *Brewster,* 203 U. S., at 551, was declared:

> "We must turn back, therefore to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the Code of the State."

POINT IV.

The only question left to this Court is whether the statute as interpreted by the highest Court of the State is in violation of the Federal Constitution.

> *Missouri & Kansas R. R. Co.* v. *Haber,* 169 U. S., 613.

In a long line of decisions of the Courts of New York it will be seen that the INTENTION of the grantor, vendor or donor must be found. This is the test of the alleged gift. The enjoyment for life of the former owner is a determining feature; necessarily the character of the gift is determined by the acts of the owner; the withholding of this possession and enjoyment of the corpus or any determinate part thereof, determines how much thereof is applicable to the statute.

The following cases, which are cited as representative cases of the State of New York upon the interpretation of similar trusts and the application of the section of the statute now under review, illustrate the general principles contended for by the respondent in error.

Matter of Brandreth, 169 N. Y., 437.
Matter of Green, 153 N. Y., 223.
Matter of Crueger, 66 N. Y. Supp., 636.
Matter of Cornell, 170 N. Y., 423.
Matter of Patterson, A. D. (1911.)
Matter of Skinner, 106 A. D., 217.
Matter of Palmer, 117 A. D., 360.
Matter of Ballard, 76 A. D., 207.
Matter of Bostwick, 160 N. Y., 489.
Matter of Keeney, 194 N. Y., 281.

Therefore when this record comes before this Court, findings of fact and conclusions of law are presented as to which this Court is bound, to wit: That the transfer of the remainders in the one-fourth share, the income of which was reserved to the grantor for life, came within the statute, and was subject to the imposition of the tax.

As to such findings of fact and conclusions of law, the determination of the State Court raises no question of error under the Constitution of the United States.

Eastern B. & L. Assn. v. *Ebaugh,* 185 U. S., 114.

That the Fourteenth Amendment does not affect or control the States in the exercise of their sovereign authority to regulate inheritances and to determine the persons or objects upon which an inheritance tax shall be imposed, is recognized in *Campbell* v. *California,* 200 U. S., 94. In which case the Court declared:

> "We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the Fourteenth Amendment compels the States, levying inheritance taxes, and *a fortiori,* in regula-

ting inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the Fourteenth Amendment has taken away from the States their power to regulate the passage of property by death or the burdens which may be imposed resulting therefrom, because that amendment confines the States absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this Court. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., 283; *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557-562. It is true that in the first of the cited cases it was expressly declared or impliedly recognized that in the exercise by a State of its undoubted power to regulate the burdens which might be imposed on the passage of property by death a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the States in the exercise of their plenary authority to regulate inheritances and to determine the persons or objects upon whom an inheritance burden may be imposed. In this case there can be no doubt, if the right of a State be conceded to select the persons who may inherit or upon whom the burden resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit."

POINT V.

A. That the tax upon the right to testamentary successions is not in contravention or in violation of any provision of the Constitution of the United States, has been uniformly established by the following decisions of the Supreme Court of the United States:

Carpenter v. *Pennsylvania*, 17 How. Pr., 456.
Mager v. *Grima*, 8 How. Pr., 490.
Magoun v. *Illinois Trust Company*, 170 U. S., 283.
Knowlton v. *Moore*, 178 U. S., 33.
Blackstone v. *Miller*, 183 U. S., 189-201.
Billings v. *Illinois Trust Co.*, 188 U. S., 97-104.
Chanler v. *Kelsey*, 205 U. S., 466.
Moffitt v. *Kelly*, 218 U. S., 400-405.

B. The right to take property by devise or descent is a creature of the law and not a natural gift; since it is a privilege granted and conferred by the State, the State may confer particular rights of succession, but with them impose conditions, limitations, classifications, and impositions upon the right of each particular succession granted.

Magoun v. *Illinois Trust Company*, 170 U. S., 283-288.
Plummer v. *Coler*, 178 U. S., 115.
United States v. *Perkins*, 163 U. S., 625-628.
Chanler v. *Kelsey*, 205 U. S., 466.
Knowlton v. *Moore*, 178 U. S., 33-41.
Wallace v. *Meyers*, 38 Fed. Rep., 184.
Matter of Hoffman, 143 N. Y., 329-331.
In re Cullum, 145 N. Y., 593.

POINT VI.

The Court of Appeals of the State of New York has construed the statute imposing this tax as a tax upon the right to particular successions, and not upon the property.

In re Swift, 137 N. Y., 77-88.
In re Merriam, 141 N. Y., 479-480-484.
In re Hoffman, 143 N. Y., 329-331.
In re Cullum, 145 N. Y., 593.
In re Sherman, 153 N. Y., 1-6.
In re Dows, 167 N. Y., 227-232.
In re Vanderbilt, 172 N. Y., 69-72-74.

It is firmly established beyond argument that this tax is not a tax upon property, nor a tax upon the technical transfer which takes place at the date of the instrument, but, on the contrary, this tax is imposed upon the transfer of that portion of the corpus whose possession and enjoyment is necessarily held back until the death of the former owner. The statute purports to attach to the TRANSFER WHICH SHE INTENDED TO TAKE PLACE AT HER DEATH.

Were the tax imposed upon the amount of the *corpus* as it existed at the date of the trust deed, then it would appear that the tax was imposed upon the technical transfer, but, on the contrary, it is based upon the amount of the *corpus* as it exists at date of the donor's death. This latter fact strengthens our argument that there is created in the trust deed a testamentary disposition of property to which this tax applies.

We have in mind a trust deed wherein the grantor reserved for life the payment of a certain stipulated sum annually, for payment not only the income but the *corpus* was applicable. Naturally, the *corpus* as it existed at the donor's death determined the amount of the tax. Had the payment of this yearly sum reduced the amount of the *corpus*, no one would have contended that the statute purported to base the amount

of the tax upon the amount as it existed on the date of the trust agreement.

> *Matter of Patterson,* App. Div., 1911, unreported (N. Y.)

It must be borne in mind that a gift *causa mortis* is one made in contemplation of "impending death." A technical transfer takes place before death, subject, however, to the rights which the owner retains in the event of recovery. The whole interest does not part before death. The tax upon such a gift does not attach before death.

In *Basket* v. *Hassell,* 107 U. S., 602, Mr. Justice MATTHEWS, going over the history of *"donationes causa mortis,"* said:

> "Until the event (death) occurs which is to divest him (the owner) the title remains in the donor. The donee is vested with an inchoate title, and the intermediate ownership is with him; but his title is defeasible, until the happening of the event necessary to render it absolute."

Thus, in the case of a gift *causa mortis,* it requires the death of the owner to effectually transfer title, so that at death a testamentary succession takes place.

A gift *causa mortis* is in reality a testamentary transfer of property, although not made by will, nor passing by intestate succession. It takes place through the intent of the owner that at his death title absolute shall pass. So also in the case of a transfer by the trust deed before us; although not made in contemplation of death, as in the case of a gift *causa mortis* (that is, impending death, the test applied by the courts), the former owner intended that the remainders in this one-fourth of the corpus should not vest in possession and enjoyment at any other time than at her death. It is this intention which is as well spelled out in a gift *causa mortis* as in the gift before us that makes the statute applicable. The statute purports to reach both these classes of testamentary transfers.

In each case the transfer is technically complete before death. For it has been said that to make a gift *causa mortis* valid to pass title, there must be such a delivery that title thereof would have passed as in a gift *inter vivos*. Yet that act alone did not make the gift complete.

Brown v. *Brown*, 18 Conn., 410.
Referred to in *Basket* v. *Hassell, supra.*

In a vague way, the gift under review is in contemplation of death, although it does not stand the test of "IMPENDING DEATH," as applied by the courts. This class of remainders has certain features in common with the ownership of property, whose testamentary disposition is provided by will, that in each case the owner enjoys for life the fullest enjoyment which the ownership and possession thereof permit.

It is for these reasons that the State should be permitted, without fear that her statute be held unconstitutional, to enact such statute or statutes as she deems necessary for this purpose, to reach remainders which have the qualities of a recognized testamentary disposition of property, which, without such statute, would escape the burdens which other citizens must justly bear.

Not only the tax as a whole, but the classifications should be upheld:

First, that this is a tax upon a right to testamentary successions.

Second, that the classifications therein have reasonable relation to the purposes and objects of such taxation.

Third, that such tax may be justified upon the ground (assuming, for the purposes of argument only, that it is not strictly an inheritance tax), yet the State may enact a statute to compel one citizen to stand the same tax burdens, which his scheme enables him to evade, as another citizen must duly and justly bear.

Fourth, that if he must stand the tax burdens which another citizen must bear, then the same tax, the same system of classification cannot work a hardship upon him; necessarily such classification need not stand any other or severer test than the test applied to the unquestioned transfer.

Although Mr. Justice CULLEN, in his opinion herein, said, "It is not an inheritance or succession tax, but it is not necessary that it shall be such to support the statute imposing it"; nevertheless, he refers to inheritance tax laws and the justification of this tax as an incident to the collection of inheritance taxes.

Does not Mr. Justice Cullen assert this necessity for the enactment of this statute, and justify the statute upon reasonable grounds? Recognizing it as a tax upon the right of testamentary successions, this tax may also be justified as a tax upon a testamentary disposition of property, effected other than by will. This trust deed does not create a gift *inter vivos*, for it lacks the test, which the courts of the State of New York apply to a completed gift, and at the same time enables an owner of property to direct its testamentary disposition, and at the same time permitting her to enjoy the possession and enjoyment thereof for life.

This latter theory, as a special tax upon the right to create testamentary successions by deed taking effect at the death of the grantor, harmonizes with the character of this tax—that the State intends to reach not only testamentary successions acknowledged as such, but all other successions taking effect as such at the death of the former owner, and that these also shall bear the same burdens which acknowledged testamentary successions shall bear.

POINT VII.

This interpretation of the tax as a tax upon the right of testamentary successions has been uniformly recognized by the Supreme Court of the United States.

Mager v. *Grima*, 8 How., 490.
Wallace v. *Meyer*, 38 Fed. Rep., 184.
U. S. v. *Perkins*, 163 U. S., 625, 628, 629 and 630.
Knowlton v. *Moore*, 178 U. S., 41, 55, 57, 59.
Blackstone v. *Miller*, 188 U. S., 189-203.
Plummer v. *Coler*, 178 U. S., 115-119-121-122.
Magoun v. *Illinois Trust Co.*, 170 U. S., 283.
Chanler v. *Kelsey*, 205 U. S., 466.
Louisville & Nashville R. R. Co. v. *Melton*, 218 U. S., 36.
Billings v. *Illinois*, 188 U. S., 97-104.
U. S. v. *Fox*, 94 U. S., 315.

POINT VIII.

And this Court will take it to have been found that the possession or enjoyment of the property passed to the plaintiffs in error, at the death of Susan A. Keeney, and that the statute was applicable to the right of succession of the plaintiffs in error to the remainders therein which vested in possession and enjoyment at her death.

Blackstone v. *Miller*, 188 U. S., 189-203.
Williams v. *Arkansas*, 217 U. S., 79.
Watson v. *Maryland*, 218 U. S., 173.
Gulf Col. Santa Fe R'way Co. v. *Ellis*, 165 U. S., 150.
Bell's Gap R. R. Co., 134 U. S., 232.
Bd. of Education v. *Ill.*, 203 U. S., 553-563.
Orient Ins. Co. v. *Daggs*, 172 U. S., 557.

Magoun v. *Ill. Trust Co.*, 170 U. S., 283-294-296.
Orr v. *Gilman*, 183 U. S., 278-287.
Knowlton v. *Moore*, 178 U. S., 41-55-83.
Cahen v. *Brewster*, 203 U. S., 552.
Ozan Lumber Co. v. *Union County Bank*, 207 U. S., 251.
Billings v. *Ill.*, 188 U. S., 97-104.

POINT IX.

A. Purpose of the State for classification.

The classification of remainders which take effect in possession and enjoyment at or after the death of the grantor, donor or vendor, wherein the beneficial enjoyment of the property is reserved to the grantor, donor or vendor, is not unreasonable, unjust or arbitrary.

The right to immediate possession and enjoyment of property is its most valuable element, it is not the right to property at a future date, but the present possession and enjoyment thereof.

That a remainderman has no right of entry or possession until the death of the preceding life tenant is indisputable.

Thus where a grantor retains the right to the present possession and enjoyment, no matter the form of the instrument creating the future estate, the remainder as it is termed, he has retained the most valuable part of the title. In a class of voluntary gifts, the absoluteness of right and enjoyment, which a completed gift carries, is wanting.

It is impossible to make any other disposition by voluntary deed, wherein the grantor retains for life the possession and enjoyment, more like the result of a truly testamentary disposition of property; in each case the owner of the property enjoys for life the possession and enjoyment and provides for its disposition at or after his death.

This one feature justified the Legislature in singling out this class as a basis for the imposition of the tax, for it is the

vesting of the possession and enjoyment of the property at or after the death of the *former owner* in those who would be the recipients of same under the last will and testament.

By the early common law, a life estate in personal property with remainder over, could not be created.

2 Kent's Comm., 352.

And an estate for life carried the absolute interest.

Smith v. *Van Ostrand*, 64 N. Y., 278.

The purpose of the Act is apparent. Such classification is based upon a reasonable ground, to wit, to reach remainders which are in purpose, contemplation, truth and effect, testamentary dispositions of property; taking effect in possession or enjoyment at the death of the *former owner,* the grantor, vendor or donor.

The courts of the State of New York have never adopted an arbitrary rule in determining the facts of each case and in applying the statute; such determination is had according to due process of law, the rules of evidence and all matters of State jurisprudence applicable thereto.

In *Orient Insurance Company* v. *Daggs*, 172 U. S., 557, it was said:

> "Legislation of a State has necessarily a wide range of discretion in distinguishing, selecting and classifying, and it was argued that it was sufficient to satisfy the requirement, if its classification was 'practical and not palpably arbitrary.' This case was cited with approval in *Louisville and Nashville Railroad Company* v. *Melton*, 218 U. S., 55."

In *Billings* v. *Illinois Trust Company*, 188 U. S., 97-104, the classification by the State of Illinois of estates of life tenants in its statute, was upheld, the Supreme Court of the United States declaring,

> "the law operated equally and uniformly upon all persons in similar circumstances";

and continuing at page 102 as to their classification,

> "that the need of classification must primarily depend upon the purpose of the Legislature as to the problem presented";

and at page 104:

> "We must regard the power of this State over the testate and intestate disposition of property, its power to create and limit estates, and as resulting, its power to impose conditions upon the transfer or devolution";

and after discussing various classifications and its decisions in the Magoun case, *supra*, said:

> "The first two classes, therefore, depend upon substantial differences; differences which may distinguish them from each other of them or either of them from the other class—differences therefore which 'bear a just and proper relation to the attempted classification,' the rule expressed in *Gulf, Colorado and Santa Fe Railroad Company* v. *Ellis*, 165 U. S., 150."

In *Heath-Milligan Company* v. *Worst*, 207 U. S., 338-354, in speaking of a classification of the standards of purity of merchandise, the Court said:

> "We will omit from citation the cases in which this Court passed upon the power of the States to classify objects for purpose of Government. * * * We have declared many times and illustrated the declaration must have relation to the *purpose of the* LEGISLATURE. A classification may not be merely arbitrary, but necessarily there must be a great deal of freedom." (Citing *Mobile* v. *Kimball*, 102 U. S., 691.)

This decision stamps with approval the decision of the Court of Appeals of the State of New York in *Matter of*

Keeney, 194 N. Y., 281, which declared not only the existence of the necessity, but the purpose of the Legislature in enacting the statute and its reasonableness.

The decision of the United States Supreme Court in *Moffitt* v. *Kelly, supra,* taken together with the decision in *Cahen* v. *Brewster, supra,* and *Magoun* v. *Illinois Trust Company, supra,* may be said to be a declaration by this Court, that where the State as a sovereign power has a right to impose a succession tax, it may select and classify objects of taxation as required by the purpose of the State, and may select the vesting of any title, when limited to vest in possession and enjoyment at the death of the grantor, donor or vendor, as a time for the imposition of the tax.

POINT X.

B. Right to classify.

In *Moffitt* v. *Kelly,* 218 U. S., 400, at page 403, it was stated:

> "It is elementary that the Constitution of the United States does not, generally speaking, control the power of the State to select and classify subjects of taxation. * * *"

and at pages 402-404, said:

> "It was, nevertheless, within the power of the State without violating the Constitution of the United States, in selecting objects of taxation to select 'the vesting in complete possession and enjoyment by the wives of their shares in the community property, consequent upon the death of their husbands and the resulting cessation of their power to control the same and enjoy the fruits thereof.'
>
> "Such classification is not merely arbitrary selec-

> tion, but is an exercise by the sovereign power of one of its rights in regulating, classifying and designating particular rights of succession, taking into account the problem presented, to wit, *the purpose of the State imposing this tax.* A State may classify subjects as long as the persons similarly situated are treated alike."

These decisions are applicable to the question now before this Court, not only as to the necessity of classification but that the State may select the "vesting in complete possession and enjoyment of a remainder" as the time for imposing the tax.

In *Cahen* v. *Brewster*, 203 U. S., 543-549, it was said:

> "In support of the attack made upon the law, it is contended that an inheritance tax is not a tax upon property, but upon the right or privilege of inheriting, and that the right in the case at bar had been exercised at the moment of the testator's death, under the then existing law, and, to 'pass a law enacting such a tax makes it retroactive, so as to divest a right previously acquired under the existing laws is a deprivation of property already acquired, without due process of law, prohibited by the Fourteenth Amendment of the Constitution of the United States.'"

And after discussing the Perkins case and the Magoun case, said:

> "These decisions only distinguish the tax from one on property, 'we defined the tax but did not prescribe the time of its imposition; to have done so would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess * * *.'"

That this *vesting in possession and enjoyment* of an interest in property is recognized as a time, which the State may designate for the imposition of an Inheritance Law, and

that the vesting in possession and enjoyment of the legacies determined their taxability is shown in *Hertz* v. *Woodman*, 218 U. S., 205-219.

In this case the question arose as to whether the repealing act of April 12, 1902, relieved from taxation legacies otherwise taxable under Sections 29 and 30 of the War Revenue Act of 1896; the Supreme Court of the United States, Mr. Justice LURTON writing the opinion, said:

> "The subject of the tax or duty exacted by Sections 29 and 30 is a right of succession which passes by death to a *beneficial right of possession or enjoyment to a legacy or distributive share.*"
>
> "Upon the facts certified, the right of succession which passed by the death of the testator was an *absolute right to the immediate possession and enjoyment*, a right neither postponed until the falling in of a life estate, as in *Mason* v. *Sargent*, 104 U. S., 689, nor subject to contingencies as in *Vanderbilt* v. *Eidman*, *supra*. No further event could make their title more certain nor their possession and enjoyment more secure"
>
> "There is nothing, therefore, in those cases, which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property of the legatee."

And discussing the objections against classifications in the statute under question, said:

> "The contention of the plaintiff-in-error that the statute denied equal protection of the laws, and that the classification was purely arbitrary, rests on the theory that the tax is one on property; in fact, it is one on the right of inheritance."

Likewise:

> *Board of Education* v. *Illinois*, 203 U. S., 353-363.

POINT XI.

C. Reasonable basis for classification.

In *Louisville & Nashville* v. *Melton*, 218 U. S., 37, it was said:

> "Reasonable basis for the classification is one of the tests."

The following cases are likewise in point:

Williams v. *Arkansas*, 217 U. S., 79.
Watson v. *Maryland*, 218 U. S., 173-178.
Ozan Lumber Co. v. *Union Co. Bank*, 207 U. S., 251.
Gulf, Colo. & Santa Fe R. R. Co. v. *Ellis*, 165 U. S., 150.
Bell's Gap R. R. Co., 134 U. S., 150.
Board of Education v. *Illinois*, 203 U. S., 232.
Orient Insurance Co. v. *Daggs*, 172 U. S., 557.
Magoun v. *Illinois Trust Co.*, 170 U. S., 283, 294, 296.
Orr v. *Gilman*, 183 U. S., 278, 287.
Knowlton v. *Moore*, 178 U. S., 41, 55, 83.
Cahen v. *Brewster*, 203 U. S., 552.
Billings v. *Illinois*, 188 U. S., 97, 104.

Upon the matter of the classification in question, the Court of Appeals of the State of New York (*Matter of Keeney*), declared:

> "We think there are sufficient reasons to support the classification made by the statute; at least that the classification cannot be said to be devoid of reasonable ground on which to rest.
>
> "A not wholly unnatural desire exists among the owners of property to avoid the imposition of inheritance taxes upon the estates that they may leave so that such estates may pass to the objects of their

bounty unimpaired. It is a matter of common knowledge that for this purpose trusts or other conveyances are made whereby the grantor reserves to himself the beneficial enjoyment of his estate during life; were it not for the fact the provision of the statute, which is challenged, it is clear that in many cases the estate on the death of the grantor would pass free from tax to the same persons who would take it had the grantor made a will or died intestate. It is true that an ingenious mind may devise other means of avoiding an inheritance tax, but the one commonly used is a transfer with the reservation of a life estate. We think this fact justifies a Legislature in singling out this class of transfers as subject to a special tax."

In *Ozan* v. *Union Co. Bank*, 207 U. S., 251, in regard to classifications generally, it was declared:

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and the Legislature ought not to be required to do so at the risk of having its legislation declared void, although *appropriate and proper* upon the general subject upon which the legislation is to act, *so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded classification*, and therefore denies to any person equal protection of the law."

In *Gulf, Colorado & Santa Fe Railroad* v. *Ellis*, 165 U. S., 150-155, the Court, commenting upon the right of the State to classify according to the need thereof, said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some 'reasonable ground—some difference

which appears to have a just and proper relation to the attempted classification.' "

Likewise:

Provident Savings Institution v. *Malone*, 221 U. S., 661-666.

Nor is a classification of remainders in the statute unreasonable, but on the contrary is within the purpose of the State to reach evasions of its tax laws, particularly transfers, which are testamentary dispositions of property, and not completed gifts *inter vivos*.

POINT XII.

The statute imposing a tax upon the transfer of this class of remainders, limited to vest in possession and enjoyment at the death of the donor, the former owner of the property, and which cannot vest at any other time or upon any other contingency, does not deprive the plaintiffs in error of any of their rights or any of the privileges and immunities of citizens of the United States, nor does it violate the Fourteenth Amendment or any provision of the Constitution of the United States.

Mager v. *Grima*, 8 How. Pr., 490.
Carpenter v. *Moore*, 17 How. Pr., 456.
Magoun v. *Illinois Trust Co.*, 170 U. S., 283.
Knowlton v. *Moore*, 178 U. S., 1
Billings v. *Illinois*, 188 U. S., 97-104.
Orr v. *Gilman*, 183 U. S., 278.
Blackstone v. *Miller*, 188 U. S., 189.
McMillen v. *Anderson*, 95 U. S., 37.
Chanler v. *Kelsey*, 205 U. S., 466.

The rights of the plaintiffs in error are claimed under the trust deed of 1903. And it is contended that the obligation

of alleged contract rights therein claimed were impaired in the case at bar. We have herein contended that no law of the State can be said to have done so, but only the judgment of the State Court.

We then must fall back upon the construction which the State Court has placed upon this trust deed and the application thereof to the Statute, and which we urge is binding upon this Court. If ever arose a case in which the construction of the State Court should be binding, such case is here presented, because all matters herein necessary to be determined involved questions peculiarly within the jurisdiction of the State Court, in regard to the imposition and collection of the inheritance tax not only upon transfers unquestionably within the statute, but upon evasions thereof.

Wherefore, we respectfully submit that this writ of error should be dismissed with costs to the defendant in error.

Respectfully submitted,

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